TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, PETITIONERS,

vs.

INDIANA TOLL ROAD COMMISSION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR CERTIORARI FILED APRIL 14, 1964
CERTIORARI GRANTED MAY 25, 1964

SUPREME COURT OF THE UNITED STATES

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IN THE LAKE CIRCUIT COURT OF LAKE COUNTY, INDIANA

Cause No. C56-605

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendants.

COMPLAINT—Filed July 26, 1956

1.

Come now the plaintiffs herein and allege and say: That they are engaged as a partnership, carrying on a business generally catering to the aviation industry, which is located on what is known as the Gary Municipal Airport through and by virtue of certain leaseholds, which the plaintiffs hold on said airport, and

2.

The defendants are a creation of the Acts of the Indiana General Assembly, 1951, Chapter 281, wherein it was created a quasi-public corporation and body politic; sui juris within the premises herein set out, together with the sovereign power of eminent domain delegated to it by the sovereign State of Indiana in said Act.

3.

Factual Situation With Respect to These Plaintiffs in the Premises

3-a. The municipal City of Gary, Indiana, is a municipal corporation, duly organized and existing, pursuant to the

[fol. 6] general laws and statutes of the State of Indiana and its municipal charter and carries on the general activities usual to municipal corporation.

3-b. Particularly and specifically, and within the premises of this complaint, the said City of Gary, as provided by law, created an airport commission by its certain Ordinance No. 2897 which was passed by the common council of said city on the 19th day of September, 1949, and was approved and signed by the mayor of said City of Gary on the 20th day of September, 1949.

3-c. That said City of Gary, through said airport commission, has acquired a municipal airport, which is generally located in Sections 35 and 36 in Township 37 North, Range 9 West, otherwise known as Calumet Township, Lake County, Indiana, and all within the corporate limits of said city; said airport is generally bounded on the north by what is known as Industrial Highway and on the east by what is known as Clark Road and on the south by what is known as the Grand Calumet River, and to the west, the confines of said airport generally approach and are adjacent to the right of way of the E. J. E. R. R. Company, as same is extended through Section 35 as aforesaid.

3-d. That upon procuring the lands aforesaid, which approximate a square mile of land, large sums of money were expended through municipal funds and grants from the United States Government and greatly in excess of $300,000.00.

3-e. Said airport is strategically located in the heart of the Milwaukee, Chicago, Hammond, East Chicago, Gary, Michigan City and South Bend industrial area. Great mili-[fol. 7] tary installations now exist either on said airport or directly adjacent thereto in accordance with defense necessities and requirements peculiar to the location of said airport.

3-f. That at the time of the promulgation of the aforesaid ordinance, there was included therein, and as a part thereof, what is known as the Gary Airport Zoning Map which delineated, defined and described details of construc-

tion and the boundaries of said airport, copies of which were then and there on file in the office of the City Engineer; and by reason of said ordinance and its incorporation of the map aforesaid therein same became a part of the official public records in the office of the City Clerk of the City of Gary.

3-g. That by reason of said ordinance and the general statutes of the State of Indiana pertaining thereto, the said City of Gary was given and acquired jurisdiction over structures for six (6) miles in all directions, radiating from said airport.

3-h. That by reason of said ordinance and the jurisdiction acquired thereby, it was duly ordained that no structure should be erected within the inner approach zone to any proposed runway and extending 6,000 feet from the proposed runway, to any height which would interfere with a glide angle of 40 feet horizontally to 1 foot vertical slope. That said ordinance provided for the acquiring of non-conforming uses and variances, which might be granted upon the showing of good and sufficient reasons therefore by the Board of Zoning Appeals in the City of Gary and under its rules and regulations which were designed to give all persons affected an opportunity to be heard.

[fol. 8] 3-i. That as a part of the improvements on said airport, there is established what is known as the north-south runway (all of which is disclosed by the Gary Airport Zoning Map, which is a part of the aforesaid ordinance), and which was designed to extend for approximately 4,000 feet along and across said airport property; and as laid out thereon was ample and sufficient for the accommodation of aircraft of all categories.

3-j. Plaintiffs further say that generally the City of Gary and the United States Government, through grants of money, built, constructed and established runways, taxi ways, park ways, building areas, ramps and utilities to be used as an airport and the establishment of leaseholds thereon and all subsequent to the zoning of the adjacent areas to the airport, which zoning had for its purpose, the limiting of heights of structures in the areas adjacent to said air-

port and making possible safe ingress and egress from said runways by those operating aircraft in and out of said airport.

3-k. That thereafter and on or about the 23rd day of March 1950, these plaintiffs were induced by the general development of said airport and the ordinance aforesaid and the zoning regulations therein, as aforesaid, and the general laws of the State of Indiana then and there existing, pertaining to the operation of airports, to enter into certain contracts with the City of Gary wherein these plaintiffs acquired certain leaseholds upon the Gary Municipal Airport, established as aforesaid, wherein these plaintiffs, in addition to the general privileges as a fixed base operation which gave these plaintiffs the right to the use of runways, [fol. 9] taxi ways, aprons, parking areas, roadways, sidewalks, navigation and aviation aids and all landing area appurtenances, facilities and improvements then or thereafter to be connected with or appurtenant to the airport and the particular privileges, uses, rights and interests necessary to:

1. The loading and unloading of airplanes owned, leased or operated by the lessee;
2. The servicing and maintaining of airplanes owned, leased, sold or operated by the lessee;
3. The maintenance, storing and servicing of airplanes; overhauling, rebuilding, repairing, inspection and licensing of same and the purchase of and sale of parts and accessories;
4. The right to buy and sell airplanes, parts and accessories, aviation parts and equipment of all descriptions, retail or wholesale, or as a dealer; distributing confections and refreshments vended by coin operated machines; and the right to maintain on the demised premises, appropriate facilities for the conducting of said business.
5. Training on the premises and generally on the airport, of personnel, in the employ of these plaintiffs and

members of the public generally as students or otherwise in any art, craft or skill pertaining directly or indirectly to aircraft. The free and unrestricted use of air field facilities and navigation aids and facilities relating thereto for the purpose of commercial and non-commercial landings, take-offs and taxiing.

6. These plaintiffs obtained the right to have the full and unrestricted use of and the right of ingress and egress to and from the demised premises, which rights of ingress and egress were extended to all those dealing with these plaintiffs and the aviation business and these plaintiffs also acquired the rights by said contracts and lease to locate, construct, erect and maintain or remove improvements upon the demised premises for the purpose of carrying out the activities usual to the aviation business and as herein set out.

7. That the term of said leasehold was the period of twenty (20) years from the date of the execution thereof with an option for an additional ten (10) year period, all of which is more particularly disclosed by the contracts and leasehold as executed by these plaintiffs and the duly constituted authorities of the City of Gary as disclosed by the recordation of said leasehold in the Miscellaneous records of Lake County in Book [fol. 10] 553, Page 377, on the 12th day of September, 1951; That after the execution of said leasehold and contract recorded as aforesaid, these plaintiffs expended large sums of money, to-wit: approximately $400,000.00 in the building of hangars, the purchase of equipment, and facilities for operation of general business upon said airport as hereinbefore set out.

3-l. And now the plaintiffs say they have for many years been engaged in the operation of airports and the aviation business; that they are experts and skilled in the business, arts and trades connected therewith; that they have established a sound and successful business enterprise as herein described, upon the leasehold herein described; that they have kept particular and accurate accounts of their business from 1951 until presently on the Gary Municipal Airport

and that they are thereby able to project the earnings of said business into the future and for a period of 25 years remaining on their leasehold and that during said time these plaintiffs would anticipate a business of approximately *$21,665,807.38* over said period of time.

4.

Factual Situation With Respect to the Defendant in the Premises

4-a. And now the plaintiffs show the court that the defendant, which came into existence as hereinbefore set out in Paragraph 2 herein, was declared by the legislature to have been created for the purpose of alleviating alleged handicaps and hazards due to alleged congestion on public highways of the state; and to facilitate vehicular traffic throughout the state; and generally to promote the agricultural and industrial developments in the state; and allegedly to provide for the general welfare by the construction of modern [fol. 11] express highways; and, in particular, the defendant was authorized, at its pleasure, to construct and maintain and repair and operate toll road projects, the location of said projects to be approved by the government of the State of Indiana.

4-b. These plaintiffs say that after careful examination of the act creating the defendant, the actual purpose for the creating of the defendant corporation was to create a special kind of corporation by legislative enactment rather than a general creation under the general corporation laws of the state; and to invest in it certain particular attributes of the sovereign, that is to say, the powers of eminent domain and the general complexion of a public corporation while doing a private business of providing a means whereby private investments could be made to approximately one-quarter billion dollars of tax exempt securities and the real purpose for the corporation was to carry on a toll road business and from the proceeds of said business, to pay off said investments.

4-c. Plaintiffs allege further that under said act, the legislature did not direct the location of any toll roads and

made no declarations as to where necessity may require the location of such toll roads, all of which was left to the discretion of a commission created by said act. That after its creation, as aforesaid, the commission aforesaid, proceeded to make a survey of the most likely and productive territory for the location of a toll road and determined to locate same along and parallel with the southerly side of the Gary Municipal Airport, and in such a manner as to cross through [fol. 12] the inner area approach zone of the north-south runway, and within 450 feet of the proposed end of said runway as set out, described and defined by the Gary Airport Zoning Map, described as aforesaid, and in such a manner as to insinuate the top of said highway approximately 23 feet into the glide path established by the aforesaid Ordinance No. 2897 and the Gary Airport Zoning Map which is a part of said ordinance, as aforesaid.

4-d. That at the time of the establishment of said toll road, located particularly, as aforesaid, and the construction thereof, the defendant commission and members thereof were charged with knowledge of the location of said airport, and the zoning limitations pertaining thereto, and as set out in said ordinances and the Gary Airport Zoning Map, which was made a part thereof, and all a part of the public records in the Office of the Clerk of the City of Gary, Indiana.

4-e. That the defendant commission and the members thereof were charged with notice of the rights of these plaintiffs upon said airport, and their investments therein, and their rights therein, by reason of the fact that their possession of the premises was open and notorious and their leasehold and all their rights and interest therein were fully described and set out and made a part of the public records of Lake County, Indiana when said contracts and leaseholds were recorded on September 12, 1951, in Miscellaneous Record Book 553, Page 377 in said county and all of which the defendants were required to take notice.

[fol. 13] 5.

How the Plaintiffs Were Damaged by the Acts of the Defendant

5-a. And now the plaintiffs show the court that their entire investment upon the said Gary Municipal Airport, as aforesaid, in the sum of approximately $400,000.00 was induced, as aforesaid, by the acts of the City of Gary, creating an airport commission and establishing said airport and the zoning of the adjacent lands for the protection and preserving of safe ingress and egress of aircraft into and upon and out of the runways established on said airport.

5-b. That said airport, created as aforesaid, created a public utility under the statutes of the State of Indiana; and when established as aforesaid, caused the contracts and the leaseholds entered into and obtained by these plaintiffs from said City of Gary, to be very valuable property rights which the plaintiffs had a right to enjoy during the terms thereof without interference from any person or corporation, including the defendant.

5-c. The plaintiffs further say that the establishment of said road within close proximity of the end of said runway and at such an elevation, as aforesaid, which added to traffic clearance on said road will work to cut the glide path of aircraft coming into said runway from an established 40 to 1 glide angle to approximately 12.5 to 1, and thus has rendered the future use of said runway useless for all practical purposes to aircraft grossing more than 15,000 pounds.

5-d. That the establishment of said highway, as afore- [fol. 14] said, was in violation of Ordinance No. 2897 and the zoning provisions contained therein, and the lawful rights of these plaintiffs as guaranteed by the 21st Sec. of Article 1 of the Constitution of Indiana and Art. 1, Sec. 10 and the 14th Amendment to the Constitution of the United States. That the establishment of said highway, as aforesaid, has greatly mitigated and lessened the value of the leasehold and the investments of these plaintiffs as aforesaid, upon said airport and the revenues which these plain-

tiffs could expect from their operations and business activities on said airport, and constitutes an unlawful taking of the plaintiff's property rights without compensation and without due process of law.

5-e. Plaintiffs further say that the establishment of said highway, as aforesaid, at such an elevation as would grossly interfere with the operations of aircraft coming into and upon said airport and leaving same was accomplished by the defendants without any regard for the right of these plaintiffs and wholly out of consideration of the financial returns which the defendant seeks to earn from its operation of the toll road. That it was entirely feasible to construct and maintain said toll road at such an altitude as would not interfere with the operations of these plaintiff's business and in such a location and in such a manner as would not mitigate or cause the destruction of these plaintiff's business as herein set out. That the officers of the defendant were called upon and advised that the manner of construction of the said toll road and at the elevation aforesaid and in the location aforesaid, would interrupt these plaintiff's business to a great extent and cause them great [fol. 15] and irreparable damage all of which the defendant corporation, its officers and agents disregarded and have paid no heed.

5-f. That the plaintiffs have ascertained through sound and certain calculations based upon their business records, (which information will be furnished the defendant is request). That if the defendant is permitted and is allowed and does maintain the aforesaid toll road, in the manner aforesaid, in the location aforesaid, they will cause these plaintiffs great and irreparable damage in the sum of $3,016,950.79.

6.

Plaintiff's Allegations of Its Rights Herein

6-a. Plaintiffs now allege and say, that in the premises as herein stated, they are entitled to an order herein restraining and enjoining the defendant from maintaining said toll road in the manner as these plaintiffs herein

set out and all to their great and irreparable damage as herein set out.

Prayer and Demand

Wherefore and by reason of the above and foregoing, these plaintiffs pray the court for an injunction herein, enjoining and restraining the defendant from maintaining said toll road in such a manner and in the location aforesaid and in the altitude and at the height aforesaid and in such a manner as to destroy the established business of these plaintiffs, costs of this action and for all other relief, just and equitable in the premises.

[fols. 16-44] Paragraph II

Damages

Comes now the plaintiffs herein and for their second and further paragraph of complaint herein, incorporate and by reference, make a part hereof, all of plaintiff's first paragraph of complaint herein contained under the headings 1, 2, 3, 4, and 5.

And now the plaintiffs say that in the premises herein set out, the defendant will cause these plaintiffs to suffer great loss by destruction of their business, all to the damage in the sum of *$3,016,950.79*.

Wherefore plaintiffs pray they have judgment against the defendant in the sum of *$3,016,950.79*, costs of this action and all other relief just and equitable in the premises, and that the issues herein be submitted to a jury.

Straley Thorpe, Attorney for The Plaintiffs.

[fol. 45]

IN THE LAKE CIRCUIT COURT OF LAKE COUNTY, INDIANA

Cause No. C56-605

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendant.

SUPPLEMENTAL PARAGRAPH OF MEMORANDA TO PARAGRAPHS I AND II OF DEFENDANT'S DEMURRER TO PLAINTIFFS' COMPLAINT

Comes now the defendant and having secured leave of Court, now files the following supplemental paragraph to its memorandum in support of Paragraph I and Paragraph II of defendant's demurrer heretofore filed in this cause.

The plaintiffs' complaint alleges that the City of Gary by ordinance, established an airport commission and expended large sums of money in acquiring lands for an airport; that this ordinance included the Gary airport zoning map which defined and described the boundaries of the airport, and limited the height of structures within six miles of the airport. (Paragraphs 1, 2, and 3a-3j.)

The plaintiffs' complaint further alleges that thereafter plaintiffs leased the airport or parts thereof from the City of Gary, and that thereafter the defendant, with knowledge of this zoning ordinance and of this lease, located a part [fol. 46] of the Indiana East-West Toll Road along and parallel with the southerly side of the airport, in violation of the zoning provisions of the aforesaid ordinance, thereby causing damage to plaintiff. (Paragraphs 3k, 5b, 5c, 5d, 5e, and 5f.)

The plaintiffs therefore as lessees of the Gary Municipal Airport claim an alleged easement right in the air above the Toll Road located south of the Gary Municipal Airport.

The enactment of said zoning ordinance by the City of Gary was, as a matter of law, an act done in the exercise of said City's police power pursuant to a delegation of said police power by the State of Indiana to said city by virtue of the Airport Act of 1945. (Acts 1945, ch. 190, as amended; Burns Ind. Stat., Sec. 14-413 et seq.) The enactment of said zoning ordinance constituted a restriction of the use of property, and did not, as a matter of law, constitute an appropriation of property within the meaning of either the Constitution of the State of Indiana or the Constitution of the United States. (See Law of Zoning, Metzenbaun, ch. IV-b, and cases therein cited.) The enactment of said zoning ordinance did not create any vested right to the City of Gary, but rather it created a restriction on the use of property surrounding the airport, subject to change by the city or the state in the reasonable exercise of its police power.

Therefore, when plaintiffs leased part of the airport from the City of Gary, they could not, by virtue of said lease, [fols. 47-48] have acquired any vested property right in the air south of the airport based on said zoning ordinance because the city itself had no such property right to lease to plaintiffs. The plaintiffs therefore acquired no such property right, by virtue of their lease with the City of Gary, which could not be taken away by a governmental body acting in the reasonable exercise of its politic power. The defendant, a duly constituted body politic in the state of Indiana, was, in locating said Toll Road along and parallel to the southerly side of said airport, acting as such a governmental body in the exercise of its politic power. Plaintiffs' complaint fails therefore to state the cause of action.

Indiana Toll Road Commission, By Charles N. Cook, General Counsel; Raymond R. Pyatt, Assistant General Counsel; William J. O'Connor, Resident Attorney.

[fols. 49-50]
IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

No. 16619

NICH JANKOVICH and PAUL JANKOVICH, doing business as CALUMET AVIATION COMPANY

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation

ORDER OVERRULING DEMURRER—November 26, 1957

The court having heretofore taken under advisement defendants demurrer to plaintiff's complaint, does now reconsider and overrule said demurrer as to both paragraphs of plaintiff's complaint.

G. L. Burns, Judge Porter Circuit Court.

[fol. 51]

[File endorsement omitted]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

Cause No. 16619

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendant.

DEFENDANT'S ANSWER—Filed February 7, 1958

Paragraph I

Comes now the Indiana Toll Road Commission, defendant in the above entitled cause, and for answer to plaintiffs' complaint alleges and says:

1. That defendant admits the allegations contained in rhetorical paragraph 1 of plaintiffs' complaint.

2. That defendant admits the allegations contained in rhetorical paragraph 2 of plaintiffs' complaint.

3. 3-a. That defendant admits the allegations contained in sub-paragraph 3-a, rhetorical paragraph 3 of plaintiffs' complaint;

3-b. That defendant admits the allegations contained in sub-paragraph 3-b, rhetorical paragraph 3 of plaintiffs' complaint;

3-c. That defendant admits the allegations contained in sub-paragraph 3-c, rhetorical paragraph 3 of plaintiffs' complaint;

[fol. 52] 3-d. That defendant is without information in respect of the allegations contained in sub-paragraph 3-d, rhetorical paragraph 3 of plaintiffs' complaint;

3-e. That defendant is without information in respect of the allegations contained in sub-paragraph 3-e, rhetorical paragraph 3 of plaintiffs' complaint;

3-f. That defendant is without information in respect of the allegations contained in sub-paragraph 3-f, rhetorical paragraph 3 of plaintiffs' complaint;

3-g. That defendant denies the allegations contained in sub-paragraph 3-g, rhetorical paragraph 3 of plaintiffs' complaint;

3-h. That defendant denies the allegations contained in sub-paragraph 3-h, rhetorical paragraph 3 of plaintiffs' complaint;

3-i. That defendant is without information in respect of the allegations contained in sub-paragraph 3-i, rhetorical paragraph 3 of plaintiffs' complaint;

3-j. That defendant is without information in respect of the allegations contained in sub-paragraph 3-j, rhetorical paragraph 3 of plaintiffs' complaint;

3-k. That defendant denies the allegations contained in sub-paragraph 3-k, rhetorical paragraph 3 of plaintiffs' complaint;

3-l. That defendant is without information in respect of the allegations contained in sub-paragraph 3-l, rhetorical paragraph 3 of plaintiffs' complaint.

4. 4-c. That defendant denies the allegations contained in sub-paragraph 4-c, rhetorical paragraph 4 of plaintiffs' complaint;

[fol. 53] 4-d. That defendant is without information in respect of the allegations contained in sub-paragraph 4-d, rhetorical paragraph 4 of plaintiffs' complaint;

4-e. That defendant is without information in respect of the allegations contained in sub-paragraph 4-e, rhetorical paragraph 4 of plaintiffs' complaint.

5. 5-a. That defendant denies the allegations contained in sub-paragraph 5-a, rhetorical paragraph 5 of plaintiffs' complaint;

5-b. That defendant denies the allegations contained in sub-paragraph 5-b, rhetorical paragraph 5 of plaintiffs' complaint;

5-c. That defendant denies the allegations contained in sub-paragraph 5-c, rhetorical paragraph 5 of plaintiffs' complaint;

5-d. That defendant denies the allegations contained in sub-paragraph 5-d, rhetorical paragraph 5 of plaintiffs' complaint;

5-e. That defendant denies the allegations contained in sub-paragraph 5-e, rhetorical paragraph 5 of plaintiffs' complaint;

5-f. That defendant denies the allegations contained in sub-paragraph 5-f, rhetorical paragraph 5 of plaintiffs' complaint.

6. 6-a. That defendant denies the allegations contained in sub-paragraph 6-a, rhetorical paragraph 6 of plaintiffs'

complaint, and defendant further denies that plaintiffs are entitled to the relief prayed for in their complaint.

[fol. 54] Wherefore, defendant asks judgment for costs.

Defendant's Answer

Paragraph II

1. The plaintiffs, having incorporated into their Paragraph II of complaint rhetorical paragraphs 1, 2, 3, 4, and 5, the defendant now admits such portions as are heretofore admitted under Paragraph I of this answer, and denies such portions as are denied under Paragraph I of this answer, and alleges that it is without information as to such portions of Paragraph II as defendant alleges it was without information in Paragraph I of this answer.

Wherefore, defendant asks judgment for costs.

Defendant's Answer

Paragraph III

Comes now the defendant and for a third paragraph of answer to plaintiffs' complaint alleges and says:

1. That prior to the commencement of the above entitled cause of action, defendant paid the claim and demand sued upon by plaintiffs in their complaint.

2. That on or about the 26th day of August, 1955, defendant and City of Gary, Indiana, a municipal corporation, and the Board of Aviation Commissioners of the City of Gary entered into an agreement, a copy of which agreement is attached hereto, made a part hereof, and identified as Exhibit A. That said agreement included, among other things:

[fol. 55] "Solution of Airport Problem

"'Said proposed route in the vicinity of Gary's Municipal Airport shall be rerouted sufficiently to the south thereof so that a fifty to one gliding angle shall exist to the present

NW-SE runway, as extended on said Airport Master Plan on the basis of said runway being elevated twelve (12) feet above existing ground level at its SE terminus. A part of the overall monetary damages provided in Paragraph 13 hereof represents damages to Gary resulting from the elevation of said runway when, as and if the same is extended. This will require a location of the route in the immediate vicinity of the crossing of U. S. 12 and Clark Road, thus carrying the Toll Road south of the Grand Calumet River and along the north boundary of the Gary Sewage Disposal Plant, and will require the straightening of the Grand Calumet River at this point."

That by the terms of said agreement defendant agreed to pay to the City of Gary, Indiana on its behalf on behalf of the plaintiffs, the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00), and pursuant to said agreement, defendant did pay to said City of Gary, Indiana on its own behalf and as agent of plaintiffs the sum of One Million Four Hundred Thousand Dollars ($1,400,000.00) at the time of execution of said agreement as aforesaid; that defendant is ready, willing and able to pay to said City of Gary, Indiana the balance of said consideration in the sum of One Hundred Thousand Dollars ($100,000.00) when, as, and if said City of Gary, Indiana conveys to said defendant Indiana Toll Road Commission certain real estate mentioned in said agreement, which real estate, however, excludes the real estate alleged by plaintiffs to be under lease to them from the City of Gary, Indiana.

Wherefore, defendant asks judgment for costs.

Defendant's Answer

Paragraph IV

[fol. 56] Defendant for fourth paragraph of answer to plaintiffs' complaint alleges and says:

1. That prior to the commencement of the above entitled cause of action, plaintiffs entered into a certain lease agreement with the City of Gary, Indiana, dated the 23rd day of March, 1950, which lease agreement is attached hereto, made a part hereof, and identified as Exhibit B.

2. That pursuant to the terms and provisions of said agreement contained in Article VIII, paragraph 6, subparagraph (d) thereof, said lease agreement provides:

"...

"It is further agreed that all grants, rights and privileges under the Standard Fixed Base Operators Ground Lease Agreement, shall be subject to all present and future laws, rules and regulations of the local, State and Federal government or of any lawful agencies thereof."

3. That said lease was made pursuant to Acts, Indiana General Assembly 1945, Chapter 190, Sections 1-7 both inclusive as amended, Acts 1947, Chapter 73, Sections 1-3, as amended, Acts 1949, Chapter 109, Section 3, and by the terms and provisions of said acts aforesaid the right of action, if any, is vested solely in the Board of Aviation Commissioners of the City of Gary, Indiana, a municipal corporation, and any action must be brought in the name of the City of Gary, Indiana growing out of any alleged violation of said act as to the regulation, control or interference with air space above or surrounding any such airport or landing field; if by reason of the premises plaintiffs are not the real party in interest in this action.

Wherefore, defendant asks judgment for costs.

[fol. 57] Defendant's Answer

Paragraph V

Defendant for fifth paragraph of answer to plaintiffs' complaint alleges and says:

1. That prior to the commencement of this action, plaintiffs and the City of Gary, Indiana entered into a certain lease agreement dated the 23rd day of March, 1950, copy of which is attached hereto, made a part hereof, and identified as Exhibit B; that subsequently defendant entered into a settlement contract with the Board of Aviation Commissioners of the City of Gary, Indiana, which settlement

agreement is made a part hereof, and identified as Exhibit A.

2. That during the negotiations leading up to the execution of said settlement agreement identified as Exhibit A, and at the time of execution of said agreement, plaintiffs were consulted by the members of the Board of Aviation of the City of Gary, Indiana and by the Mayor of the City of Gary, Indiana, and were fully apprised of the terms and conditions of said settlement agreement identified as Exhibit A, but that throughout said transaction plaintiffs failed and refused to make known to this defendant, the City of Gary, Indiana, or the Board of Aviation Commissioners the alleged claims sued on in their complaint. By reason of the premises plaintiffs are estopped and precluded from now making or asserting the claims and demands sued on in their complaint.

Wherefore, defendant asks judgment for costs.

[fols. 58-243] Charles W. Cook, Jr., Geo. A. Purvis, 309 West Washington Street, Indianapolis 4, Indiana;

Chester, Clifford, Hoeppner & Houran, Farmers State Bank Building, Valparaiso, Indiana;

Galvin, Galvin & Leeney, 7th Floor Calumet Building, Hammond, Indiana,

Attorneys for Indiana Toll Road Commission.

[fols. 244-366]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

No. 16619

NICK JANKOVICH and PAUL JANKOVICH, doing business as CALUMET AVIATION COMPANY

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation

JUDGMENT—October 1, 1960

This cause having heretofore been taken under advisement, the court now finds for the defendant on paragraph one of the complaint and judgment for defendant denying an injunction against the defendant. The court now finds for the plaintiff on paragraph 2 of plaintiff's complaint and awards judgment for plaintiff in the sum of $164,000.00 and costs.

It Is, Therefore, Ordered, Adjudged and Decreed by the court that the plaintiff, Nick Jankovich and Paul Jankovich, doing business as Calumet Aviation Company, do have and recover of and from the defendant, Indiana Toll Road Commission, a Corporation, the sum of $164,000.00 plus the costs and accruing costs of this action.

Alban M. Smith, Special Judge.

[fols. 367-370]

[File endorsement omitted]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

Sitting at Valparaiso, Indiana

Cause Number 16619

NICK JANKOVICH and PAUL JANKOVICH, d/b/a CALUMET AVIATION COMPANY, Plaintiffs,

vs.

INDIANA TOLL ROAD COMMISSION, a Corporation, Defendant.

DEFENDANT'S BILL OF EXCEPTIONS NUMBER 1, CONTAINING THE EVIDENCE—Filed December 6, 1961

Be It Remembered, That on the 22nd day of March, 1960, it being the 44th day of the February Term, 1960 of the Porter Circuit Court, Honorable Alban M. Smith, Special Judge in said cause presiding, the following proceedings were had in this cause; and the cause being at issue, and without the intervention of a jury, the plaintiffs, to maintain the issues on their behalf, introduced the following evidence:

* * * * * * *

[fol. 371] And PAUL JANKOVICH, one of the plaintiffs and a witness on behalf of plaintiff, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

* * * * * * *

[fols. 372-375] Q. From the time you started, from the time you learned to fly in 1933, when did you get into the aviation business as a business?

A. In 1932.

Q. And where was that?

A. That was on the old Gary Airport on 61st and Broadway.

* * * * * * *

[fol. 376] Q. Now, Mr. Jankovich, I will ask you when it was that you moved to the Gary Municipal Airport—that is, the new airport?

[fol. 377] A. We officially moved, I think, in 1950.

Q. Permit me to ask you this: from all this experience you have related with respect to aircraft, in the flying of aircraft and the handling of it, I will ask you if you are familiar with what is termed "glide angle", you understand what that means?

A. Yes, I am very familiar with that.

Q. And I will ask you also if you are familiar with those procedures which are usually adopted and used by pilots skilled in the profession with respect to safety factors and handling in the flying of these aircraft?

A. Yes; I am.

Q. So as I understand it, from your knowledge you are able to state with accuracy what may or may not be safe with respect to the industry, your opinion as to what may or may not be safe, and state the basis of your opinion?

* * * * * * *

A. Yes.

* * * * * * *

[fols. 378-396] Q. Mr. Jankovich, I will ask you what the fact is as to whether or not you moved over to what is now known as the Gary Municipal Airport, moved your business?

A. Yes.

Q. When was that?

A. 1950.

Q. Now I will ask you, what is the fact as to whether you entered into—without stating what they are—you and your brother entered into any contractual relationship or obtained any leasehold from the City of Gary upon the tract of land which is now known as Gary Municipal Airport?

A. Yes, we did.

Q. And pursuant thereto, as I understand it, you moved over onto the airport and established the business which you have now there?

A. That is correct.

• • • • • • •

[fol. 397] The Court: As I understand it, exhibit number 1 is an exemplified copy of an ordinance adopted October 25, 1939 based upon a 1929 act, and the objection to the introduction and the acceptance of that exhibit as part of the evidence is this: the acts of 1945 repealed the acts of 1929 and by reason of that this ordinance is immaterial and the exhibit is not embraced within the issues set out in the complaint, having reference to the lease that is executed and set out in the complaint under the acts of 1945.

Mr. McMahan: Plus the further grounds, it varies with the pleadings as they allege the creation of an aviation commission in 1949.

The Court: I am going to admit that provisionally because it may have something to do with the overall pic-[fol. 398] ture here. I can see there is a possibility it might be immaterial as I look at it now, but there may be something develop later on that might make it material. Based upon that reservation I will let it go into evidence at this time.

• • • • • • •

[fol. 399] The Court: Now as to plaintiffs' exhibit number 2—

• • • • • • • •

The Court: I believe I will let it go in.

• • • • • • • •

[fols. 400-406] Mr. McMahan: If the Court please, the defendant will object to the admission in evidence of plaintiffs' exhibit number 3, the purported ordinance of the City of Gary, Indiana for the following reasons separately and severally:

• • • • • • • •

[fols. 407-474] Mr. McMahan: I think the reporter's record should show that plaintiffs withdrew their offer of plaintiffs' exhibit 3.

• • • • • • •

[fol. 475] Q. Now, Mr. Jankovich, do you recall when the Toll Road was constructed in proximity to the Airport?

A. To the best of my knowledge I would say it was the end of 1956, in that area.

Q. When was the complaint filed?

Mr. McMahan: July 26, 1956.

A. It must have been after that because it wasn't completed until after the filing of the lawsuit.

Q. Now, Mr. Jankovich, previous to July 26, 1956 I will ask you what is the fact as to whether you were occupying the premises known as the Gary Municipal Airport?

A. We were.

Q. And when did you go in there?

A. We went in there the first part of 1950.

Q. Now as part of the improvements of the Airport what if anything did you furnish yourselves or what did you build there?

[fol. 476] A. We built the large aircraft hangars and the small aircraft hangars and the small gasoline bulk plant.

* * * * * * *

Q. Now with reference to the airport, where was the Toll Road constructed?

A. It was constructed along the south boundary of the airport.

* * * * * * *

Q. As you understand, the river was approximately the south boundary of the airport?

A. Approximately, as I understand it.

Q. When the Toll Road was constructed I will ask you what if any buildings were located on the airport that you had put up there or that you had built there?

A. It is all the buildings that are there at the present time which consisted of two large storage hangars with a [fol. 477] shop area in between and an office extension on one side; three rows of "T" hangars; that are the only buildings that were constructed.

Q. What if any signs or indications were there on the field which would indicate you were in possession of the premises?

A. Well, our name was inscribed in large letters, our business name, on a hangar.

Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 9.

(Photograph referred to marked by reporter for the purpose of identification, plaintiffs' exhibit number 9.)

Q. Mr. Jankovich, I hand you what has been identified as plaintiffs' exhibit number 9 and ask you to examine it, and having done so, I will ask you to tell us if you recognize the subject matter of that photograph?

A. Yes, I do.

Q. And what is it?

A. This is a photograph of the large hangars we have erected that were the same in 19—

Q. Just a minute. He will be objecting to you not being responsive. With respect to that photograph I will ask you if the signs which appear on the hangars were there before the Toll Road was constructed in 1956?

A. The sign that appears on the front was there at the time.

Q. How about the one on the side?

A. The one on the side was painted in the last few years; I think it was after the Toll Road.

Q. But aside from the sign which says "Gary Municipal [fols. 478-510] Airport" that is a true picture of the hangars and the sign as they appeared before the Toll Road was built, is that right?

A. That is right.

Q. Do you now recall approximately when the Toll Road was completed?

A. I think it was completed in the late fall or early winter of 1956—it was completed in late 1956 or 1957, I don't recall.

* * * * * * *

[fol. 511] Q. Now, Mr. Jankovich, calling your attention to, just previous to the time the Toll Road was constructed, I will ask you what was the extent of the improvement by way of runways which existed on this Gary Airport?

* * * * * * * *

A. The improvement over the original layout, there was an extension made on two ends of one runway.

* * * * * * * *

Q. Do you recall when the Toll Road was built?
A. I believe I do.
Q. When was it?
A. It was built during the latter part of 1956. It took a year to build. It is in that area, 1956 and the first part of 1957.

• • • • • • •

[fol. 512] Q. With respect to the year 1955 I will ask you now to describe what the extent of the construction of the north-south runway was.
A. The length, you mean?
Q. Yes.
A. 3,600 feet.
Q. And what was the length of the east-west runway?
A. 4,600 feet.

• • • • • • •

Q. You have described the length of the two runways. What is the fact as to whether taxi-ways had been constructed?
A. Taxi-ways were constructed parallel to both runways.
Q. And what would be the extent of those taxi-ways?
A. They would be the same length as the runways with little cross-overs to get to them.
Q. Where did they originate and end?
A. They originated on one end of one runway and ended on the end of the same runway.
Q. That is rather indefinite. Tell us where the taxi-ways started and where they ended up.

• • • • • • •

[fol. 513] A. The taxi-ways parallel the runways, then they are extended to the hangar area.
Q. How many runways were there on this airport that had been constructed in 1955?
A. Two.
Q. And with respect to the present date has there been any change in the construction of those runways?

• • • • • • •

A. Not since 1955 there were no extra runways, but the construction was repaved without any length being added;

just the repaving the way they were, the runways, taxi and parking ramp.

Q. What was the length of the north-south runway in 1955, if you know?

A. 3,600 feet.

Q. And what is its length today?

A. 3,600 feet.

* * * * * * *

"Q. Now at the time you executed plaintiffs' exhibit num-
[fols. 514-515] ber 4 do you now recall what the proposed extent of the north-south runway was?")

* * * * * * *

A. The proposed runway was to extend 3,900 feet.

* * * * * * *

[fol. 516] Q. Now, Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit 9 and I will ask you what the fact is as to whether that exhibit is a reasonably correct photograph of the things—the subject matter that is shown in it with respect to the hangars as they existed at the time the Toll Road was constructed?

A. It is.

Mr. Thorpe: We now offer in evidence plaintiffs' exhibit 9, your honor, please.

* * * * * * *

[fols. 517-518] The Court: The exhibit may go in. It may be admitted in evidence.

* * * * * * *

[fols. 519-520] Q. Now, Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit number 11 and ask you to examine it, and having examined it I will ask you just to tell us what it is and not describe the contents.

A. This is an aerial view of our installation at the Municipal Airport.

Q. And with reference to when the Toll Road was constructed I will ask you whether that is a reasonably accurate representation of the improvements upon the airport as they existed at that time?

A. It is.

* * * * * * *

[fol. 521] Q. Now, Mr. Jankovich, I hand you again plaintiffs' exhibit 11 and indicating thereon what appears to be the hangars on the east side of the ramp: I will ask you to describe generally what the size of those hangars are?

A. There are two large hangars that have been abutted, are side by side, and each of the two measures 120 feet square. Between the two we have a shop area of 40 by 120. On the south end we have an office section 20 by 120, which gives us an overall building under one cover of 120 feet by 300 feet.

Q. And I will ask you who built and paid for that hangar?

A. My brother Nick and I built and paid for it.

Q. Now indicating three buildings here—long buildings that appear to be just west of the main hangars, I will ask you to tell us what those are?

A. Those are what is known as nested T hangars. They house smaller aircraft, and we have three rows of ten each.

Q. How many aircraft will those hangars house?

A. Each hangar row will house ten, so three would house thirty.

Q. Mr. Jankovich, I will ask you who built and paid for those hangars?

A. My brother Nick and I built and paid for them.

Q. Now indicating in the picture what appears to be a runway extending north and south on this picture, I will ask you what, in truth and in fact, that is?

A. That is the end of the north runway as it existed since about 1954 or 1955.

Q. You say "the north runway." What designation does [fol. 522] that runway have?

A. The true number, as we refer to runways rather than directions—we refer to numbers—this would be 2-20; 2 in one direction and 20 in the other direction.

Q. With respect to the vernacular and the general direction, how would you describe that runway?

A. This runway limited to the northerly direction would be classified as 20 degrees, and limited in the southerly direction it would be classified as 200 degrees.

Q. Generally this is the north-south runway?

A. We refer to it as north-south runway.

Q. Now I will ask you with reference to your testimony yesterday that was the runway you told us was originally designed for approximately how many feet?

A. The Master Plan called for 3,900 feet.

* * * * * * *

Q. You testified yesterday that was designed for a length of so many feet; I believe it was—

A. It was 3,900.

* * * * * * *

The Court: He testified 3,900. It was 3,600, and proposed 3,900.

* * * * * * *

[fol. 523] Q. Now, Mr. Jankovich, will you please describe the location of this airport with respect to the township in which it is located? First, what township is the Gary Airport located in?

A. Calumet Township.

Q. And with reference to downtown Gary where is it located?

A. From the center of downtown Gary to the center of the Airport it is approximately three and a half miles to the west.

* * * * * * *

Q. Can you definitely locate the Airport within Calumet Township now by other objects?

A. Yes.

Q. All right, will you do so?

A. Well, the Airport is bounded on the north by U. S. Highway Number 12; bounded on the west by the E. J. & E. Railroad; bounded on the south by the Grand Calumet River, forming a triangle.

Q. And approximately how many acres are there in this Airport?

A. Approximately 610.

Q. Now, Mr. Jankovich, with reference to the metropolitan area tell the court what direction it is from the City of Chicago?

[fol. 524] A. It is southeast of the City of Chicago.

Q. And about how far?

A. Twenty miles from the center of downtown Chicago.

Q. And with respect to Milwaukee where is it located?

A. It is 100 miles south.

Q. And with respect to South Bend where is it located?

A. West of South Bend approximately 55 miles.

Q. And with respect to Benton Harbor and St. Joseph where is it located?

A. About 65 miles southwest.

Q. And with respect to Michigan City where is it located?

A. West about twenty-five miles.

Q. And Valparaiso?

A. Northwest twenty miles.

Q. And Hammond, Indiana?

A. It is about seven or eight miles east—or northeast of Hammond.

Q. What if any military installations you know may be located within the near proximity of this Airport?

A. There is a military installation located on the Airport proper.

Q. And where is it?

A. It is on the west end of the Airport, and they have one small part of that installation on the south end.

Q. What is the nature of those particular installations?

A. It is a Nike anti-aircraft missile base.

Q. Now within the near vicinity of this Airport I will ask you what if any other military installations you know of that exist?

[fol. 525] A. South of the Airport, if you call that near vicinity, about five miles there is another Nike missile base.

Q. With reference to Lansing, Illinois I will ask you how far Lansing is from the Airport?

A. Lansing is approximately nine or ten miles southwest.

Q. Do you know what if any military installations are located there?

A. Yes.

* * * * * * *

Q. What did you say?

A. You asked me if there were any other installations at Lansing and I said yes.

Q. What does that consist of?

A. They have another Nike anti-aircraft missile base, and the Illinois National Guard is based there. I should qualify that and say the aircraft buildings of the Illinois National Guard are based at Lansing.

Q. What is the fact as to whether there is any military aircraft on the Gary Municipal Airport itself?

A. Yes, there are.

Q. What does that consist of?

[fols. 526-527] A. We have military aircraft owned by the Indiana National Guard that is based there all the time.

Q. Now, Mr. Jankovich, calling your attention to the 23rd day of March, 1950—that is the date of the execution of the Fixed Base Contract—I will ask you to describe at that time what installations had been negotiated on the Airport at the time of the execution of that contract?

A. Do you mean physical facilities of the Airport?

Q. Yes. On the date of the execution of the contract what had been negotiated with respect to the construction of the Airport?

A. The Airport had been graded and drained and runways had been built, and parking ramps.

Q. Do you know who had paid for that construction?

A. The federal government and the City of Gary in conjunction paid for it.

Q. With respect to any other work that had been done there previous to the execution of these contracts on the 23rd day of March, 1950, can you relate any others?

A. Previous to that date the section of the ground had been leveled and drained; some foundations had been put in by the War Assets Administration. They were going to use that area for a synthetic rubber plant. Then that was abandoned and it was deeded back to the City of Gary. And from that time on the federal government and the City had matched funds in the improvement of the Airport.

* * * * * * *

[fol. 528] Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 12.

(Photograph referred marked by reporter for the purpose of identification, Plaintiffs' Exhibit Number 12.)

Q. Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit 12 and ask you to examine it and without particularly describing it I will ask you this exhibit is?

A. This is a photograph facing south off of the end of the south runway.

Q. Now you say "south runway." You mean north-south runway?

A. Looking south off the end of the north-south runway.

Q. And with reference to when the Toll Road was constructed was that view taken before or after?

A. After the Toll Road was constructed.

Q. Now I take it this in the bottom is the south end of the runway, is that correct?

A. That is correct.

Q. That is the present runway?

A. That is correct.

Q. Now with respect to the end of this runway can you tell us approximately how far it is over to the Toll Road?

• • • • • • • •

[fol. 529] A. The approximate distance from the end of the north-south runway—the distance from the end of the north-south runway to the Toll Road is approximately a thousand and forty or fifty feet.

• • • • • • • •

A. I would like to correct the distance I gave: rather than 1040 or 1050 feet I would like to correct it to approximately 800 feet.

• • • • • • • •

Q. Mr. Jankovich, again referring to plaintiffs' exhibit [fols. 530-531] 12 would you be able to tell us when the photograph was taken: do you know?

A. I don't know the exact date. I would say it was taken this year. There haven't been any changes since the Toll Road was built until now, so it was taken in that period of time.

Mr. Thorpe: Do you have any other question with respect to it, Mr. McMahan?

Mr. McMahan: No.

The Court: It may be admitted in evidence.

• • • • • • •

[fol. 532] Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 13.

(Photograph referred to marked by reporter for the purpose of identification, Plaintiffs' Exhibit Number 13.)

• • • • • • • •

Q. Let's go back and start over again. Where was this picture taken from?

A. That picture was taken 600 feet south of the end of the north-south runway.

[fol. 533] Q. The south end?

A. About 600 feet south of the south end of the north-south runway.

Q. Now with reference to the Toll Road, tell us approximately how far the camera was from the Toll Road?

A. Approximately 200 feet.

Q. And which direction from the Toll Road?

A. It would be north of the Toll Road looking south. The picture was taken looking south.

Q. Now with respect to any changes which might have been made from the time the Toll Road was built, is this an approximate depiction of the matters set out in the photograph as of the time when the Toll Road was constructed?

A. This is practically the exact condition that existed when the Toll Road was constructed.

Q. Now with respect to animate objects, or the tr[illegible] that appear in this photograph, do you know where those trucks are located in the photograph?

A. They are traveling on the Indiana East-West Toll Road; they are heading in a westerly direction.

Q. And on what side of the Toll Road?

A. They are on the north side of the Toll Road going west.

Mr. Thorpe: We offer in evidence plaintiffs' exhibit number 13. If you have any questions, Mr. McMahan, you may ask him.

* * * * * * *

[fols. 534-535] The Court: It may be admitted in evidence.

* * * * * * *

[fol. 536] Mr. Thorpe: Mark this photograph plaintiffs' exhibit number 14.

(Photograph referred to marked by reporter for the purpose of identification, Plaintiffs' Exhibit Number 14.)

Q. Now, Mr. Jankovich, I will hand you what has been identified as plaintiffs' exhibit 14 and ask you to examine it, and after having done so I will ask you first what generally the subject of that photograph is?

A. This is an aerial view looking north from the south approach end of the north-south runway.

Q. Obviously that was taken from an airplane, is that right?

A. That is correct. The top view shows part of the wing of the airplane.

Q. Who was flying the plane?

A. I was flying it.

Q. Now with respect to the height at which the airplane must fly at the time the photograph was snapped, will you tell us how high it was?

A. I would approximate about 100 feet.

Q. I will ask you this is that appears to be a railroad in the foreground of this exhibit?

A. That is the roadbed of the South Shore Railroad.

Q. Now with respect to the roadbed of the South Shore Railroad, how far south were you flying at the time you took this photograph, approximately?

A. I would have to approximate about 300 feet.

Q. Now between what appears to be the north-south runway and the railroad, I will ask you what appears in this photograph?

[fol. 537] A. Well, it is an elevated section of roadway which is the East-West Indiana Toll Road.

Q. Now I will ask you if this photograph substantially

represents the physical features as they obtained at the time the Toll Road was constructed?

A. It does.

Q. Do you recall about when this photograph was made?

A. That photograph was taken in the summer time according to the leaves of the vegetation, and so forth, and I would say it was probably taken last summer sometime, probably in the summer of 1959.

Q. Now particularly with respect to the background here, the background in the right side of the photograph, I will ask you what appears in that?

A. In the right background the hangars we have built on the Municipal Airport appear.

Q. All of them?

A. As much as can be seen on the T hangar side. Some are blocked by the front hangar. The other hangars are fairly well distinguishable.

Q. With respect to the runway, I understand this picture discloses the runway as it was at the time the Toll Road was constructed, is that right?

A. That is right.

Mr. Thorpe: We offer in evidence plaintiffs' exhibit number 14.

. . . . . .

[fol. 538] Voir dire examination.

By Mr. McMahan:

Q. Mr. Jankovich, looking at plaintiffs' exhibit 14 I notice what appears to be a white line or something between the south end of the north-south runway and the Toll Road, and I will ask you if you know what that is?

A. Yes, I believe I do.

Q. What is that white line; what does it represent?

A. That is a little temporary road used for vehicles to go around the end of the runway.

. . . . . .

Q. What kind of vehicles?

A. Well any vehicles, but mostly used by military vehicles.

Q. What is the construction of that road?

A. The last time I saw it—it was a dirt road at first; now I think they have some stone on it, stone or slag.

• • • • • • •

[fols. 539-540] The Court: It may be admitted in evidence.

• • • • • • •

[fol. 541] Direct examination resumed.

By Mr. Thorpe:

Q. Now, Mr. Jankovich, with respect to the original installation of the north-south runway I will ask you what the first development of that runway was, the length of the first development?

A. The first length was 3,100 feet.

Q. Now I will ask you with respect to that length of runway and ask you to tell me from your experience as a pilot as to whether that runway, located as it was, was adequate for all classifications of aircraft?

• • • • • • •

A. I would say 3,100 feet could not handle all types of aircraft.

Q. What is the fact as to whether that construction, 3,100 feet, was laid down previous to the construction of the Toll Road?

A. Yes, that was the first installation.

Q. What if anything was done with respect to this runway for the purpose of improving its utility as a runway [fol. 542] for the use of all types of aircraft?

A. The runway was extended to make it suitable for all types of aircraft.

Q. And how far was it extended; to what extent?

A. It was extended 500 feet to a total length of 3,600 feet.

Q. And with respect to the construction of the Toll Road when was that done?

A. That was done previous to the Toll Road, I believe, several years.

• • • • • • •

Q. Mr. Jankovich, you have just told us that the original layout of the runway was not adequate for all classes of aircraft, in your opinion. You said the runway was extended. Now what else, if anything, was being done with respect to improving the utility of this runway?

* * * * * * *

[fol. 543] A. At that time negotiations were being made with the South Shore Railroad to remove a temporary obstruction to make that runway more usable.

Q. Do you know what height the obstruction over the South Shore Railroad would have been after the improve-

[fol. 544] ment or the removal that you were talking about?

A. Yes.

Q. And what would it have been?

A. It would have been 24 feet above the roadbed.

Q. That is, the South Shore roadbed?

A. That is correct.

Q. Now, Mr. Jankovich, let me ask you this: in your experience as a pilot over past years, and your experience in the army, and with respect to heavy aircraft, particularly any aircraft over a weight of 15,000 pounds gross, I will ask you what you consider to be a reasonably safe glide angle for taking off and landing such aircraft?

* * * * * * *

A. I consider a 40 to 1 glide angle to be reasonable and safe.

* * * * * * *

[fol. 545] Q. Now, Mr. Jankovich, I will ask you this question: Do you know the reason why the obstructions at the South Shore Railroad was not cut down or removed; do you know why?

A. Yes.

Q. Why?

A. After the intrusion of the Toll Road there was no necessity to cut them down because the hazard was greater than what was there originally.

Q. The hazard created by what?

A. By the Toll Road.

Q. Mr. Jankovich, with respect to this runway where

were the hazards, if any, located previous to the construction of the Toll Road?

A. The hazards were south of the South Shore Railroad, which were—do you want me to elaborate what they were?

Q. Yes.

A. They were mainly temporary obstruction poles; mainly poles for obstruction lights, should we say, and some poles on the South Shore Railroad that were needlessly extended above their minimum height.

Q. As I understand it, that is what you were talking about in negotiating the reduction of them?

A. That is correct.

Q. Now that constituted a hazard before the Toll Road [fol. 546] was built, is that right?

A. That is right.

Q. After the Toll Road was built what if anything became a hazard for the runway?

A. The Toll Road itself with the traffic it bore over the road.

Q. Now just before the Toll Road was built, Mr. Jankovich, and having in mind the runway which had been improved by lengthening as you described it, I will ask you what categories or classifications of aircraft could reasonably use that runway, in your opinion?

A. Practically all aircraft, in my opinion.

Q. After the Toll Road was constructed at the height which it was constructed, I will ask you what would be your answer with respect to what classifications and categories of aircraft could use that runway?

A. The heavier multi-aircraft could not use it safely; it would have to be smaller type aircraft.

Q. Now let's particularly get into classifications which the court can understand. You say "heavier aircraft." Can you give me some dividing line between aircraft that could safely use that runway with the Toll Road there, and those which could not safely use it with the Toll Road there?

A. We use a general figure of 15,000 pounds and over, gross weight, are considered heavy aircraft; under 15,000 pounds gross weight are considered lighter aircraft.

Q. Now, Mr. Jankovich, after the Toll Road was built [fol. 547] there, I would like for you to describe to the

court in as simple language as you can, what kind of a hazard this Toll Road presented to a pilot attempting to take off over the top of it going to the south, in heavy aircraft. Now start off from the beginning and tell his honor in simple language so that he can understand.

A. Heavy aircraft, as stated, of heavy weight, naturally they take more of a run for taking off. Once they get off the ground their climb is very slow—by "climb" I mean in feet, not in forward speed. The forward speed is fast but their climb is very slow. Therefore, they must have a long enough runway with very limited obstruction so they could clear it safely.

Q. Now with respect to the elevation of the Toll Road, and as you know of it, as you approach—now I am referring to plaintiffs' exhibit 14, if your honor please—I will give it to you so you can follow it— Strike that question. Mr. Jankovich, assuming a south wind of fifteen knots—I think I had better change that. Assuming a south wind of approximately seventeen miles an hour—seventeen to eighteen miles an hour, assuming you are the pilot of an aircraft, say, of 30,000 pounds gross weight: do you have in mind some aircraft about that size?

A. Yes.

Q. What would that be, for the purpose of this question.

A. The aircraft would probably be a Lockheed Ventura.

Q. All right. Now we will assume you are going to take off to the south in a seventeen or eighteen mile wind over [fol. 548] this Toll Road in a Lockheed Ventura. Now first where would you start?

A. I wouldn't start.

Q. That is a good answer. And why wouldn't you start?

A. Because I don't think the flight could be made safely in clearing the Toll Road.

Q. Now let's come down the line; let's assume an aircraft in the weight class of around 20,000 pounds gross. Now do you have in mind an aircraft of that weight?

A. Yes.

Q. And what would that be?

A. That would probably be a Lockheed Lodestar.

Q. Now having in mind a Lockheed Lodestar and as-

suming you were the pilot of that aircraft: —have you ever flown a Lodestar?

A. Yes, sir.

Q. And you are perfectly familiar with it, are you not?

A. Yes, sir.

Q. What type of aircraft is it?

A. It is a twin-engine aircraft of about a complement of fifteen or eighteen passengers.

Q. And the horsepower?

A. Usually they have 2,500 horsepower, combination of two engines.

Q. And gross speed?

A. Gross speed of approximately 200 miles an hour.

Q. Now we will assume you are going to— You say it is a Lodestar?

A. Yes, sir.

Q. You are going to take the Lodestar down to the north [fol. 549] end of the runway, and you have a seventeen or eighteen mile-an-hour wind out of the south, down the runway; what procedure would you use to get off?

A. I don't think that would be attempted—it couldn't be safely attempted.

Q. You couldn't open the throttle and start out?

A. No, it would be too much weight and too much risk.

Q. Now coming down to the lighter aircraft, say in the 15,000 pound class, do you have in mind a type of aircraft that would fit that roughly?

A. Well, roughly, there is what they call the Lockheed Electra and Lockheed 10—we will call it Lockheed 10 to keep it away from the jets.

Q. Lockheed 10, what is that equipped with?

A. That is equipped with 450 horsepower engine, a total of 900 horsepower.

Q. Generally what is that used for?

A. That is generally used for transportation of company personnel and things like that: light corporate—

Q. Light corporate personnel?

A. Light corporate personnel.

Q. And with respect to the value of one of those aircraft, what would be the approximate value of one of those?

A. The value when they are new would run about $100,000.00.

Q. Now we will assume for the purpose of this question that you are flying one of those Lockheeds, and you are flying it, an executive personnel of some class, and you go down to the north end of the runway and you are faced [fol. 550] with a seventeen or eighteen mile wind, now what would you do with respect to an attempt to get off on that runway?

A. It would be safe to take off.

Q. It would be safe?

A. Yes.

Q. Now with respect to classification of aircraft of lower weight, that is to say, a gross weight under 15,000 pounds, what would you say would be the fact as to whether they could use that runway safely, assuming a south take-off in a seventeen or eighteen mile wind?

A. The last aircraft I mentioned was under 15,000, so I would say anything under 15,000 could use it safely providing the equipment was in good condition.

Q. Now I want you to describe to the court, having in mind, Mr. Jankovich, a railroad with open obstructions such as poles or fences or something of that nature, and an obstruction which is solid, as is indicated by the construction of this Toll Road, with respect to plaintiffs' exhibit 13 and as disclosed by that exhibit. I will ask you if there is any difference, or any different particular characteristics that a pilot is faced with when he is attempting to negotiate those hazards?

A. Well—

Q. That calls for a "Yes" or "No" answer.

A. Yes.

Q. Now what may the difference consist of?

A. Well, it is common knowledge you can't go through a solid object such as an embankment or solid wall, whereas, electrical wires can be penetrated without substantial in- [fol. 551] jury to the personnel going through the wires. There may be damage to the under side if there is any other obstruction but wires can be flown through to a certain extent.

Q. So I understand what you are saying is, one is that the hazard presented by the South Shore here was of a different nature than that presented by the Toll Road?

A. It is possible to go through the wires without very much damage, whereas you can't go through a solid object. That is common knowledge. I am speaking mainly in emergency. You don't make it a practice to go through wires.

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[fol. 552] Q. Mr. Jankovich, having in mind the hazard and obstruction which existed before the Toll Road was built, along the South Shore Railroad, what if any atmospheric disturbance would be created by that sort of an obstruction?

A. The atmospheric disturbance would be very slight.

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[fol. 553] Q. Now, Mr. Jankovich, having in mind the construction of this Toll Road in the manner in which it was constructed, I will ask you what if anything about it besides its elevation would materially affect the glide path of aircraft seeking to come into or leave the north-south runway?

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[fol. 554] A. The obstruction of the Toll Road would create a turbulent air condition on both sides depending on which way the wind was blowing, on the takeoff in one [fol. 555] direction and the approach on the other, which I would like to explain.

Q. Go ahead and explain it; that is part of the question.

A. Now air has practically the same characteristics as water, as far as an explanation is concerned. When you have water flowing over a certain area and hits a great big obstruction, it goes over the top and creates a considerable turbulence. Air has the same characteristics. Water going across an area and flowing over a high obstruction will create a considerable turbulence on the opposite side. Air will do the same thing. Therefore, we always take off into the wind. So naturally on the south takeoff we have considerable turbulence of air before encountering the Toll Road, and this being a downward trend of air would have a tendency to keep the aircraft down; keep it from its normal flight. On the other hand, landing in the opposite

direction, the air would be hitting the Toll Road from the north creating a turbulence on the south approach. That would give the same turbulence and sinking of the airplane, so far as the Toll Road. So far as other obstructions are concerned, water flowing over a fence or posts or poles or wire, will go through with very little turbulence, but water going over a solid object will create quite a swirl and quite a turbulence. So air will act the same way.

Q. What would you or any other skilled pilot have to do to avoid—strike that. When an aircraft hits that turbulence, even though it may clear the obstruction, what is the hazard that affects the safe glide of the aircraft? [fol. 556] A. In the turbulent condition the turbulence is more of a down-draft and tends to settle the airplane towards the ground, where in its normal path it would go on undisturbed.

Q. Now a pilot approaching that sort of an obstruction and knowing that condition exists, where then would the safe glide angle be with respect to the obstruction—that kind of an obstruction?

A. Naturally the only safe way to do it would be come in at a higher altitude above the glide path and give safe clearance over the obstruction; but in turn it will shorten up the length of the runway you have left.

Q. Now with respect to the runway that you had, the north-south runway on the Gary Airport at the time the Toll Road was constructed and after it was constructed, and having in mind what you have just described, approximately how much of that runway then would be usable for aircraft?

A. Did you say before the Toll Road?

Q. After the Toll Road.

A. After the Toll Road we would probably have an actual usable length due to curtailment of our glide path of 3,000 feet left—3,000, around in that area, I should say.

Q. And with respect to the landing and takeoff of all classifications of aircraft would that be adequate?

A. No, sir.

Q. What classifications would it be adequate for?

A. It would be adequate for aircraft grossing under 15,000 pounds.

[fols. 557-560] Q. It would be?

A. Yes.

Q. And over that?

A. No.

Q. Now, as I understand it, you came on to the Airport—moved your business in 1950, is that right?

A. Yes.

Q. Now what classifications of aircraft were doing business with you then on this Airport?

A. We were usually at the beginning doing business with aircraft under 15,000 pounds.

Q. Now going forward up to the time that the Toll Road was constructed what classifications of aircraft were dealing with you by way of new business?

A. We were dealing mostly with aircraft over 15,000 pounds gross weight.

Q. When you say "dealing with them," what was the nature of your business with them?

A. Well, we were storing and servicing some of the large aircraft on the field, and we had a lot of transient aircraft that came in for refueling, and so forth.

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[fols. 561-569] The Court: Let plaintiffs' exhibit 4-b be admitted.

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[fols. 570-576] The Court: 4 and 4-a are admitted in evidence.

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[fols. 577-580] The Court: As you know, last night I took some exhibits home to study, together with the substance of the objections made by the defendant, and after studying the offered exhibits and considering the objections to the admission of plaintiffs' exhibits 6 and 7 into evidence, I am of the opinion that the exhibits ought to be admitted. Exhibits 5 and 5-a show that plaintiffs' exhibits 6 and 7 were negotiated at the time of the execution of plaintiffs' exhibit number 4 and were subsequently executed and then became a part of the general business operation. I believe the allegations of the complaint are broad enough to warrant the admission of plaintiffs' exhibits 6 and 7 and therefore they are admitted in evidence.

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[fol. 581] And ROWLAND ALFRED FABIAN, a witness for the plaintiffs, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

Q. Will you state your name, please?
A. Rowland Alfred Fabian.
Q. And where do you live?
A. 508 Lake Street, Hobart, Indiana.
Q. And I will ask you what your occupation or profession may be?
A. Civil engineer and land surveyor.
Q. Where did you go to school, Mr. Fabian?
A. Purdue University.
Q. What if any degrees do you have?
[fol. 582] A. Bachelor of Science in civil engineering.
Q. What particular projects have you worked on in the past—that is, public projects, I would say?
A. Through my corporation, Fabian-Fabian Engineers, we do civil engineering and land surveying service in the State of Indiana.
Q. And what if any public projects have you worked on during your business career?
A. Many housing projects in the Calumet area. We do an extensive amount of work for the Northern Indiana Public Service Company. I have done work for the City of Gary; done work for the Indiana Toll Road Commission.
Q. What particular work have you done with respect to the City of Gary?
A. Personally, commencing to act in the year 1950, I have done layout work, surveying work and field measurements for the City of Gary and Aviation Commission in relation to their airport. I have done work for the owners of the airport.
Q. Now with respect to the airport, do you mean the Gary Municipal Airport?
A. Gary Municipal Airport.
Q. And that is the airport which is located just to the north of the Toll Road, is that right?

A. Yes.

Q. In the City of Gary?

A. Yes.

Q. Now, Mr. Fabian, I will ask you, what is the fact as to whether you have prepared—I will put it this way: tell [fol. 583] me whether you have made any investigation or measurements—or actually made measurements with respect to the physical characteristics and aspects of the terrain as it lays to the south of the north-south runway as it is located on the Gary Municipal Airport, and as it was located at the time the Toll Road was constructed?

A. I have.

Q. Do you have those drawings with you?

A. I have.

Q. May I have them, please?

A. Yes. (Hands documents to counsel)

Mr. Thorpe: Mark this plaintiffs' exhibit number 15.

(Document (drawing) referred to, marked by reporter for the purpose of identification Plaintiffs' exhibit number 15.)

Q. Mr. Fabian, I will ask you to examine what has been identified as plaintiffs' exhibit 15 and after having examined it I will ask you if you recognize this exhibit?

A. I do.

Q. And I will ask you if you know who prepared it?

A. I did.

Q. Now what does that purport to show?

A. It is a two-scale representation of a 3,600 foot north-south runway. It shows this runway is intersected by another runway—

Q. Running in what direction?

A. Running generally northwesterly and southeasterly.

Q. Yes.

A. It shows further certain specific measurements, showing the extent of the airport property, the width of the [fol. 584] Grand Calumet River as it exists on the date here shown. It shows measurements from the Grand Calumet River to the north edge of the Toll Road pavement, and it shows another measurement which is the distance

from the north edge of the Toll Road pavement to the center line of the South Shore Railroad. It shows the approximate location of six temporary lighted poles. All of these measurements on the center line projected of this north-south runway.

Q. Now specifically locating the subject matter of this exhibit, I will ask you, what is the fact as to whether that pertains to the north-south runway on the Airport which is known as the Gary Municipal Airport?

A. It does.

Q. I note at the bottom of this exhibit, Mr. Fabian, you have some drawings on what appears to be a graph, is that right?

A. Yes, sir.

Q. Will you state what that represents on this exhibit?

A. This is a graphic representation of the elevation of the ground and existing improvements from the end of the north-south runway across the Gary Airport property to the river bank. The river bank elevation is shown; the water elevation is shown; the edge of the river is again shown which would be the south bank of the river; the elevation of the edge of the Toll Road, the pavement, is shown and noted, and the ground between the Toll Road and the South Shore Railroad is graphically represented, and the elevation of the top of the rails of the South Shore [fol. 585] Railroad are graphically represented, and the elevation of those temporary lighted poles are generally described in there graphically.

Q. When you say "generally described," explain what you mean by that.

A. We are representing a large area out there on a small piece of paper, and in engineering tolerance it is an elevation of say a thousand feet of land represented on a piece of paper 36 inches long, and as a consequence the thickness of a pencil amounts to a foot or two of elevation in a thousand feet of distance. As a consequence the graphic representation is the general elevation of it, while noted values are specific.

Mr. Thorpe: Now, your honor please, we offer in evidence what has been identified as plaintiffs' exhibit number 15.

The Court: Plaintiffs' Exhibit Number 15 may be admitted in evidence.

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[fol. 586] Mr. Thorpe: Mark this plaintiffs' exhibit number 16.

(Document (drawing) referred to marked by reporter for the purpose of identification Plaintiffs' Exhibit Number 16.)

Q. Mr. Fabian, I hand you what has been identified as plaintiffs' exhibit number 16 and ask you to examine it, and after having done so I will ask you if you recognize that exhibit?

A. I do.

Q. Do you recognize the subject matter of it?

A. I do.

Q. Who prepared it?

A. I did.

Q. Now, Mr. Fabian, I will ask you to tell us generally what this exhibit represents.

A. This exhibit is the report of the field measurements made prior to and shown on the previous exhibit. This exhibit is very similar to the other exhibit only it doesn't show anything graphically pertaining to these measurements along the center line. In addition to the previous things shown on the exhibit, this is expanded to show again in generality the location of the E. J. & E. Railroad, the Toll Road, the concrete ribbons—by that I mean the concrete strips of pavement. It shows the South Shore Railroad tracks; it shows the Toll Road right-of-way; it shows the general location of the Grand Calumet River in this immediate area. It shows specific measurements along this center line of the north-south runway. It shows only the end of the north-south runway, and it shows a general location of some obstruction poles. It shows the general elevation—or the specific elevation of the top of the South Shore [fol. 587] rails; it shows the specific location of the elevation, and the elevation of the Toll Road pavement, and it shows the specific elevation of the end of the runway. It shows specifically where the measurements were taken—in other words, on the previous drawing we speak in generalities it was so many feet. This one shows where those feet

were measured and how it was measured. It is a report of the field measurements.

Q. I see some figures here at the bottom indicating trolley wire. Now I will ask you to explain what if anything that notation on this plat means?

A. In addition to these other measurements on the center line projected off the north-south runway where it crossed the trolley wire of the South Shore Railroad, the measurement of the elevation was taken and was noted. That elevation is the specific elevation at the point of intersection of the two lines. It being the line of the trolley wire, which is electrical, where it lies on the top skid of the railroad track, it being an electrical railroad, is the intersection of the trolley wire and the center line projected of the north-south runway.

Mr. Thorpe: The plaintiffs offer this exhibit number 16 in evidence.

Mr. McMahan: May I ask one preliminary question: This probably would be equivalent to what you surveyors call field notes?

A. It is a report of my field notes. It isn't my specific field notes—

[fol. 588] Mr. McMahan: Field notes reduced to a map?

A. That is correct.

Mr. McMahan: The defendant has no objection.

By Mr. Thorpe:

Q. Who made the field notes?

A. I did and my surveying crew under by personal direction. I was on the job.

By Mr. Thorpe:

Q. You were on the job?

A. Yes, sir; specifically.

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The Court: Plaintiffs' Exhibit Number 16 may be admitted in evidence.

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[fol. 589] Direct examination.

By Mr. Thorpe:

Q. Now, Mr. Fabian, as I understand it, you testified you had done some work for the Indiana Toll Road Commission?

A. Yes, sir.

Q. Do you know when that was?

A. My work with the Indiana Toll Road Commission preceded the actual construction. We did a lot of work in the right-of-way acquiring.

Q. What year was that?

A. 1954 and 1955.

Q. Do you know when the Toll Road was finally constructed and traffic was permitted to use the road?

A. Generally speaking I think it was opened in 1956.

Q. About what time?

A. August or September.

Q. Sometime—

A. In the fall.

Q. In the summer or fall?

A. Yes.

Q. Now, Mr. Fabian, aside from your professional qualifications I will ask you what is the fact as to whether you are also an aircraft pilot?

A. I am.

Q. Now, Mr. Fabian, I will ask you if it isn't a fact you have been familiar with the construction of the Gary Municipal Airport from the start?

A. That is true.

Q. Now with reference to some time previous to the construction of the Toll Road in its present position, I will ask you if you were familiar with the original construction and layout of the north-south runway as it is now located upon [fol. 590] the airport?

A. I am.

Q. And what was the length of the original construction of it?

A. 3,100 feet.

Q. And what if anything was done to that runway with respect to any improvement for the purpose of increasing the utility of that runway?

A. It was lengthened.

Q. And how much was it lengthened, if you recall?

A. Specifically it was lengthened 200 feet on the south end 300 feet on the north end, to an existing total length of 3,600 feet.

Q. I will ask you what is the fact as to whether that was the existing length of the runway at the time the Toll Road was constructed?

A. It was.

* * * * * * *

Q. What if anything else would you know was being done with respect to increasing the utility of the north-south [fol. 591] runway at or about the time that it was lengthened and before or at the time the Toll Road was being constructed?

* * * * * * *

A. To answer this question is extremely difficult in the fact that counsel has not asked me to build up my background of the relations with the Gary Airport Commission, and I can't answer the question "Yes" or "No"—

Q. If you can't, that is a good answer to me. Now, Mr. Fabian, with respect to what may or may not have been an obstruction to the approach—or in the approach and getting out of the north-south runway, I will ask you if you know what if any obstructions may have existed previous to the construction of the Toll Road?

A. The wooden poles, the support poles for the trolley wire of the South Shore Railroad are an obstruction and [fol. 592] hung up there. Then at the approximate end of the first stage of the Gary Municipal Airport some right-of-way lights—not right-of-way lights but some obstruction lights were caused to be put upon some temporary wooden poles.

Q. With respect to that I will ask you if you know what if anything was being done to reduce those obstructions at or before the time the Toll Road was constructed?

A. I know that there were negotiations going on between the powers to be—

Q. Now specifically—you say "powers". That may mean a lot of things. Who do you mean?

A. The consulting engineers for the Toll Road Commis-

sion—I beg your pardon—Gary Airport Commission and the South Shore Railroad—

Q. And who was the consulting engineer?

A. Beine, Hall and Curran.

Q. Anybody else?

A. The contractor occasionally. There were daily meetings and at these meetings these things occurred and at which I was present.

Q. What was the object of these negotiations?

A. To lower these wooden poles and the center line of the South Shore Railroad, and with the lowering of the wooden poles and the center line of the South Shore Railroad the obstruction light poles could also be lowered a proportional amount.

Q. As an engineer I will ask you whether that was feasible or not?

A. It is feasible—was feasible.

[fol. 593] Q. As a matter of fact there was no reason why that could not be done?

A. No, sir.

Q. Now as an engineer do you know to what height then the obstruction, after the removal of these temporary obstructions—to what height any obstructions over the South Shore Railroad could have been reduced to; do you know that?

A. I do.

Q. Tell us what it would be.

A. The support poles constructed by the Toll Road Commission for the South Shore Railroad immediately west of the E. J. and E. Railroad track, these support poles on the top of all—I am referring now to specific tops of all—

Q. Yes.

A. The support poles could be and can be taken as they were west of the E. J. and E. Railroad by the Toll Road Commission of a height of 24 feet above the top of the rails.

Q. Now as I understand it, you know those were contemplated negotiations going on?

A. Yes, sir.

Q. Mr. Fabian, do you know whether that was ever done?

A. No.

Q. Do you know why it wasn't done?

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Q. You can answer that "Yes" or "No", do you know why it was not done?

A. Yes.

Q. And why was it not done?

[fol. 594] A. The construction of the Toll Road interrupted the collections of money, or whatever it took to put this plan into operation.

Q. Now when the Toll Road went through, you are familiar with the elevation of the Toll Road, are you not?

A. Yes.

Q. Now before the Toll Road went in what was the effective operating obstruction to ingress and egress to this north-south runway, any obstruction that there may have been?

A. The obstructions were the center support poles for the trolley wires of the South Shore Railroad.

Q. After the Toll Road went in, then what was the effective obstruction to the ingress and egress of this north-south runway?

A. The Toll Road and any vehicles upon the Toll Road.

Q. Then, as a matter of fact, anything that might have been done with respect to reducing of any obstructions along the railroad became useless?

A. Yes.

Q. Now, Mr. Fabian, previous to the location and construction of the Toll Road, I will ask you if you know where the river bed of the Calumet River was?

A. Yes, sir; I do.

Q. Do you know what if anything was done with respect to the construction of the Toll Road to the bed of the Calumet River? Now that is asking for a "Yes" or "No" answer, if you know.

A. Yes.

[fol. 595] Q. What was done with respect to the Calumet River?

A. It was shifted north.

Q. And who did that?

A. The Toll Road Commission.

Q. And do you know how much it was shifted north?

A. Only generally.

Q. Generally how much was it shifted north?

A. As small as 100 feet and as much as 175 feet.

Q. Mr. Fabian, now again referring to plaintiffs' exhibit number 15 which you have prepared, and indicating thereon the center line of the north-south runway as it intersects the river bed of the Grand Calumet River, and the north side of it, I note that you have an engineering designation thereon which indicates Gary Airport property. Is that correct?

A. Yes, sir.

Q. With respect to this particular exhibit I will ask you if that refers to the Calumet River as it now is or before its removal?

A. As it now exists on the date of this drawing and the subsequent exhibit 16 are measurements taken in the month of January, 1958. So at least is after the construction of the Toll Road.

Q. Now previous to the construction of the Toll Road, and if you were drawing this property line in, where would it have to be represented on this exhibit?

A. What is shown here as the north line of the Grand Calumet River and the south line of the Grand Calumet River as it exists on this drawing on this date, what is the [fols. 596-615] south line of the Grand Calumet River now was, prior to the construction of the Toll Road, the approximate—

Mr. McMahan: What is now the south line of the Grand Calumet River is—

The Court: He said the present south line.

A. (Continuing) The present south line of the Grand Calumet is what was formerly the north line of the Grand Calumet River.

Q. And with respect to the Airport property, where would the south line of the Airport property have been approximately?

A. 175 feet farther south than the two exhibits show it now.

Q. That would be approximately the width of the river?

A. Approximately the width of the river.

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[fols. 616-618] And TURNER CURRAN, plaintiffs' witness, being recalled to the Stand, testified as follows:

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[fol. 619] Voir dire examination.

By Mr. McMahan:

Q. Mr. Curran, with reference to the runways which are indicated upon plaintiffs' exhibit 3-b, can you tell us whether the runways were actually constructed as they are shown on the exhibit?

* * * * * * *

A. When you say that the alignment of the runways as shown on this exhibit 3-b is the same for the existing run-[fol. 620] ways—that is, the northwest-southeast runway and the north-south runway, the east-west runway, has never been constructed as of today.

Q. Has the northwest-southeast runway been constructed according to this exhibit?

* * * * * * *

A. They have been constructed to come up to this in the future. The existing runway is 100 feet wide, where this one shows—I believe it shows 150; I am not sure of that but I believe it does. The existing runway is constructed 100 feet wide and the existing runway now has 4,600 feet length; whereas, the master plan as of this date shows a proposed future length of 6,000 feet.

Q. With reference to the north-south runway has it been constructed in accordance with this proposed lay-out plan?

A. Again I say, that the alignment has remained as shown in accordance with this master plan. The runway at present is 3,500 feet—3,600 feet—I beg your pardon—the master plan as of this date showed 3,900 feet proposed eventually.

Q. And the width was not the same either?

A. Again, the width as shown on the master plan is 150 feet and the construction is 100.

Q. And actually isn't it a fact that the north 300 feet of the existing runway extends beyond the boundaries as indicated on this map?

A. That is right.

[fol. 621] Q. So the existing 3,600 feet of runway at this time does not lie entirely within the boundary as marked on plaintiffs' exhibit 3-b?

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A. That is right. That additional 300 feet doesn't show on exhibit 3-b.

Q. It is not part of the outline of the runway on the exhibit, is it?

A. That is right.

• • • • • • •

[fol. 622] Mr. McMahan: The defendant, Indiana Toll Road Commission, objects to the admission in evidence of plaintiffs' offered Exhibit Numbers 3, 3-a and 3-b for the reasons that same are defective, unenforceable, void and unconstitutional and for the following specific reasons, separately and severally:

The defendant is an essential governmental agency and not subject to any zoning ordinances, general or airport;

That the attempt to establish glide angles or slopes in controlling the height of structures and objects near an airport by zoning is the unconstitutional taking of property without payment of due compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana;

[fols. 623-630] That the enactment of the purported airport zoning ordinance is an unlawful and unreasonable exercise of the police powers of the City of Gary, Indiana, in attempting, through zoning, to do that which must be done under the City's right of eminent domain;

• • • • • • •

[fol. 631] The Court: I understand the matter now is on the objection to the admission of plaintiffs' exhibits 3, 3-a and 3-b.

Mr. McMahan: And 10.

The Court: And 10. This morning, and all morning long, I have been going over this decision and trying to find some law that might satisfy the court in what it is going to do.

The Indiana Legislature has enacted two acts. The legislature enacted what is known as the Airport Act of 1945 and in that act granted municipalities the right by ordinance to create aviation authority with certain delegated [fol. 632] powers, duties and rights. One of the powers that it granted to the municipality was the right to zone areas surrounding an airport and setting up that the authorities thus created would have the right of eminent domain and would have the right to exercise, having rules, regulations and so on, as to the proper conduct of the airport to provide for the safety of airplanes using facilities coming in and going out. It also gave the right to the airport authorities under the ordinance which the municipality was empowered to enact, the right of eminent domain which is a governmental function.

The legislature also, in 1951, created the Toll Road—the Indiana Toll Road Act and acts amendatory thereto—under which a Toll Road commission was created, with the right to establish a public highway, and under that act the Toll Road Commission was given the right of eminent domain and the right of police powers.

The question raised in the objection—it has been stated as an objection in substance—that the ordinance as adopted by the counsel of the City of Gary is invalid and that it is an unenforceable ordinance and is the granting of an unreasonable delegation of police powers. Also that if the ordinance is invalid it is not enforceable against the State of Indiana, and also that the zoning feature of the airport ordinance is attempting to do under police powers what the courts say should be done under the provisions of eminent domain.

We have two statutes in the State of Indiana in which [fol. 633] a grant of police powers is given to each. Under the Airport Act of 1945 municipalities are given the right to establish airports and to adopt ordinances with reference to their control, and with reference to providing rules and regulations for the safe conduct of airplanes used going to and from the airport. In this particular case they have extended—zoned the area surrounding the airport—the physical site of the airport. At the same time the State of Indiana under the statute has created an agency

of the state to establish a Toll Road and fixing its alignment.

I note in reading the Airport Act of 1945, and Section 14-417, that one of the paragraphs says, "No state, county, city or other highway, road, street or other public way, no railroad, powerline, or other right of way of any kind or nature shall be laid out or opened across any airport or upon or in such proximity thereto as to affect the safe operation thereof without the approval of said board and council, both concurring.".

Now that is the limitation in my opinion of the police power on the part of any other agency in the exercise of its police power. And it is an extension of the police power which the Airport Act of 1945 has created.

The question is whether or not there is a conflict between the Airport Act of 1945 and the Toll Road Act of 1951 so as to render the ordinance as created under the Airport Act of 1945 as and being subservient to the Toll Road Act and render it inoperative, ineffectual and in-[fols. 634-637] valid so far as to meet the conditions of this objection. I believe that you must read both statutes together so that you can reconcile them both, if possible. I don't believe they are in conflict. In my opinion as between both of them I feel there hasn't been a delegation of the City of Gary under the ordinance—under the statutes created under the Airport Act of 1945 which would render that ordinance invalid. I think it has probable exercise of police powers. What the distinctions are I don't know. I reason that together that it answers the matters of whether or not it is enforceable against the state—they are both agencies of the state. I don't feel there is any conflict between these statutes.

With reference to the third objection that the zoning ordinance is attempting to do under police powers what the courts say should be done under the right of eminent domain, I don't feel this statute imposes an obligation upon the airport authority to condemn that area which immediately rests outside—without the physical boundaries of the airport as established under the statute of 1945. Therefore, I am going to permit the exhibits to be admitted. I am admitting the exhibits into evidence.

• • • • • • •

[fols. 638-639] And PAUL JANKOVICH, one of the plaintiffs and a witness on behalf of Plaintiffs, being recalled to the Witness Stand, testified as follows:

Direct examination resumed.

By Mr. Thorpe:

* * * * * * *

Q. Now, Mr. Jankovich, I hand you what has been identified as plaintiffs' exhibit 8 and ask you to look at it and examine it and tell us if you recognize that instrument?

A. I do.

Q. Will you tell us generally without stating the contents, what it is?

A. It is a modification and amendment of our original ground lease.

Q. I note this purported amendment was dated the 6th day of September, 1955, is that correct?

A. That is right.

Q. Now with reference to this particular amendment of the lease I note that it has to do with the second hangar which was constructed on the Airport, is that right?

A. That is right.

Q. And I think you heretofore testified you and your brother built that hangar and paid for it?

A. That is right.

Q. When was that hangar built and paid for?

A. The hangar was built either 1953—

Q. I mean—

A. About 1954.

* * * * * * *

[fols. 640-643] Mr. Thorpe: I think this is the last exhibit I have now, your honor please, and I offer it in evidence.

* * * * * * *

Mr. Thorpe: Permission to offer them, and I am now offering them.

* * * * * * *

[fol. 644] Q. Now, Mr. Jankovich, I think when we got off of the flying business we were discussing the effect

of turbulence over a solid obstruction such as the Toll Road, and discussing procedures in getting out—off of the Airport. Now let's assume the wind around in the northerly quadrant, that is to say, off somewhere in the north and blowing approximately down the north-south runway as it is now and as it was back in 1955 and 1956, and we will assume again a wind of approximately seventeen or eighteen miles an hour, and assuming again an aircraft approximating 30,000 pounds gross weight. I believe you identified an aircraft similar to that, did you not?

A. I did, yes.

Q. What particular aircraft do you have in mind?

A. Lockheed Ventura.

Q. Now assuming, for the purpose of landing, that you were going to attempt to land that aircraft on the north-south runway: I will ask you in the interest of safety if you would attempt to land that aircraft on the runway with the Toll Road in the position in which it is now and the elevation at which it has been constructed?

* * * * * * *

[fol. 645] Q. I will ask you, what has been your experience with the Lockheed Ventura, for instance?

A. Well, I have flown them occasionally.

Q. And have you ever had occasion to land them on the Gary Airport?

A. Yes.

Q. And have you had occasion to land one on the north-south runway?

A. Yes.

Q. And was that previous to the construction of the Toll Road?

A. Yes.

Q. Have you ever landed one afterwards—after the Toll Road was constructed—on the north-south runway?

A. No, I haven't.

Q. I again ask you the same question I previously asked you, as to whether, in the interest of safety, you believe it would be safe to attempt to land that aircraft under the circumstances which I just set out for you?

A. I don't think it would be safe.

Q. Now with respect to this particular aircraft, what is the approximate landing speed of the Ventura?

A. Our landing or touch-down speed is roughly 120 miles an hour.

Q. Now assuming that you are going to land that aircraft and there were no obstructions which would prevent your landing, will you describe the procedure which is necessary for you to prepare for a landing and execute a landing of that aircraft?

[fol. 646] A. Well, in the first place, from a safety standpoint, we have to make a straight approach for the landing two miles without any turning; straight in at a low altitude with partial power; that is, brake in its power and real shallow, and we attempt to reduce the speed and hit the end of the runway and just cruise in on the runway at about 120 miles an hour.

Q. Now of course obviously at 120 miles an hour—is that the approach speed you attempt to maintain or landing speed?

A. That is landing speed. Our approach speed is approximately 150 miles an hour on a final approach, and we slow down from 150 to 120 at touch-down.

Q. Now you have said two miles out you had to straighten out and line up with the runway. Do you know approximately how many feet that would be?

A. Two miles you mean?

Q. Yes.

A. Two miles is a little over 10,000 feet.

Q. That would be a little over 11,000—

A. No.

Q. No, 5,280—a little over 10,000 feet?

A. That is right.

Q. Now how long, or how many seconds would it take you on the average to negotiate this 10,000 feet into the runway?

A. Oh, it would be around 45 or 50 seconds; something less than a minute.

Q. Now going to the next category that we discussed the other day, I think in the 20,000 class: now you identify the aircraft of approximately that weight, do you not?

[fol. 647] A. I do.

Q. And what do you designate it as being?

A. Lockheed Lode Star.

Q. Have you flown a Lockheed Lode Star?

A. I have.

Q. And are you familiar with it?

A. I am.

Q. And have you ever landed one on that Gary Airport previous to the construction of the Toll Road?

A. I have.

Q. Now would you regard an attempt to land a Lode Star under the circumstances which I have just indicated to you on the north-south runway over the Toll Road as it was constructed and is now constructed?

A. You say, would I attempt to land it?

Q. Would you, in your opinion as a pilot, believe it is safe to attempt the landing of that aircraft?

A. No, sir.

Q. Now approximately what is the landing speed of the Lode Star?

A. It is approximately 100 miles per hour—95 to 100.

Q. Now with respect to the landing run of these heavy aircraft such as you have described, what procedure do you have to use in bringing them to a halt, and tell us approximately how much runway is necessary to bring them to a halt under the conditions we have been discussing.

A. Well, that is a rather long question. We always figure the longer the better, but the less runway you have the harder it is on the braking action on the airplane. [fol. 648] We have to cramp the brakes which is hard on the airplane and gives severe stresses, and we assume a 3,600 runway is just about the minimum we would like to use.

Q. Now getting down into the 15,000 pound gross, I think you described an aircraft, or identified an aircraft which would fall in that category, is that right?

A. Yes, I did.

Q. And what did you describe?

A. I think I mentioned a Lockheed 10 and Beach Craft. I think they are both about the same size.

Q. Now with respect to these heavy aircraft we have been talking about, from 15,000 up to 30,000, possibly over, is there any material difference in the landing charac-

teristics of these heavier aircraft; that is, between the whole category—the individual aircraft in the category?

A. They are pretty much the same. Aircraft about 15,000, their landing and take-off characteristics are the same.

Q. Now again assuming this 15,000 pound aircraft and the particular Lockheed, for instance, that you have described, let me ask you this, if in your opinion that is a fairly representative aircraft of that classification?

A. Yes, it is.

Q. And would that be true of the other two classifications, that is, the 20,000 and 30,000—you have identified one aircraft. Now with respect to all of the others are they what might be determined as representative of all aircrafts in those weight categories?

A. Yes, I would say so.

[fol. 649] Q. Now are you familiar with the Lockheed 10 you have described?

A. I am fairly familiar. That is an older airplane and isn't being used very much more. I just take it as a weight-type aircraft.

Q. Let's assume one being used now, a current type of aircraft in the 15,000 pounds gross weight category: can you think of one that is being currently used possibly more so than the Lockheed 10?

A. You mean below 15,000?

Q. No, 15,000 or just in that area.

A. Roughly there isn't exactly around that. You have to go down to probably 10,000. There is an area between 10 and 15 there is hardly any aircraft I could pick out that is in that weight category.

Q. By that you mean they run from 15 on up?

A. That is correct.

Q. All right. There are some of these 10's. Let's talk about that.

A. That is, the 15; they aren't 15. They are in the 10 or 12 thousand. There isn't anything right at 15,000.

Q. In your experience as a pilot and assuming the conditions we have heretofore described, I will ask you, what would be your opinion as a pilot whether it would be safe to land a Lockheed 10, for instance, under the conditions we have assumed?

A. Yes, I think it is safe.

Q. Now going back to these heavier categories: now you have this other runway on the airport, is that right?

A. That is right.

[fol. 650] Q. And it was constructed and was in operation at the time the Toll Road was constructed?

A. Yes.

Q. Approximately how long is that runway?

A. It is approximately 4,600 feet.

Q. Now assuming again this Lockheed Ventura and a 17 to 18 mile wind blowing out of the north, the same conditions I described before: now I will ask you, Mr. Jankovich, from the standpoint of a pilot and the standpoint of safety—you say you couldn't get in on the north-south runway—I will ask you if—having in mind safety factors—it would be safe to attempt to land in that aircraft on the northwest-southeast runway?

A. No, sir.

Q. And explain to the court why it would not be.

A. Well, aircraft that are landing into the wind, they don't have any appreciable danger so far as getting out of track and drifting or anything because they are headed into the wind and tend to stay weathervane into the wind. When they are coming in a severe cross-wind—we call "severe" anything over fifteen miles an hour—aircraft wants to drift at the rate of fifteen miles an hour to the side opposite the way the wind is blowing, and the pilot has to veer the airplane into the wind and drop a wing; in other words, what we call "crabbing" into the wind and keep your directions straight. Instead of doing so the aircraft comes in sideways, or slightly sideways, and the pilot must be very skilled to catch that landing wind before [fol. 651] it hits the ground and straighten it up in a cross-wind landing. Otherwise, when the airplane hits it lands in a drifting position or drifting attitude and it creates a severe side load on the airplane landing gear, and such side loads are liable to collapse the landing gear and cause considerable damage to the aircraft.

Q. So that now, if you were unable to get onto the north-south runway, then, as I understand what you have said, the pilot has no alternative, he has to go away?

A. That is right.

Q. Would what you have said with respect to the Ventura also apply to the Lode Star in the 20,000 pound class?

A. It would.

Q. Now with respect to under the 15,000 pound class, what is the fact as to whether you have the same difficulty in crosswind landing with those aircraft?

A. Yes, the crosswind difficulty is essentially the same.

Q. Could you, however, make a crosswind landing with the lighter aircraft with less danger than you could with the heavier aircraft?

A. Yes, that is possible, due to the fact the light aircraft is much more maneuverable than heavy aircraft. Heavy aircraft is much slower to respond to the controls, where light aircraft is quicker.

* * * * * * *

[fol. 652] Q. Now, Mr. Jankovich, you have heretofore testified as to the improvements which you and your brother put on the field. Now with respect to equipment and investments in parts that you had on the field, particularly at the time the Toll Road was built, I will ask you to describe what other equipment and facilities you and your brother had furnished for the field at that time.

A. Well, as far as parts, and so forth, we have a complete inventory of scientific engine parts which we supply to the industry in general. We have quite large stocks of aircraft parts, miscellaneous parts such as propellers, tires [fol. 653] and sparkplugs and wheels and landing gear; other parts in general that make up a complete inventory. We also had airplanes.

Q. How many at the time the Toll Road went in?

A. Our aircraft vary from year to year. I would say we probably had four or five.

Q. Describe them. What kind were they?

A. Well they are Beacheraft, Bonanzas, Cessnas and I think we had one Swift and possibly one or two Aeronca aircraft.

Q. And what have you today?

A. At the present time we have two Beacheraft and one Swift and one Cessna. "Now do you have other equipment on the airport?"

Q. Yes.

A. We have a tractor or two usually—

Q. What kind of a tractor?

A. Ford tractor, and we do have a small caterpillar we are not using now but at that time I think it was there. And we always had one or two mowers for mowing the field. We have a couple of gas trucks.

Q. What capacity are those trucks?

A. One is 2,000 gallon and one is 400 gallon. We have a bulk plant—I don't know whether you call that equipment. That is a bulk plant on the field.

Q. What does that consist of?

A. Consists of three 12,000 gallon tanks. Then we also have numerous miscellaneous equipment such as aircraft engine heaters, ground heaters used in the winter time. And we have welding equipment and other general main-
[fol. 654] tenance equipment that is used on an airport.

Q. Do you have a maintenance shop?

A. We do.

Q. With respect to that describe it briefly. What does the shop consist of?

A. We have an aircraft maintenance and overall shop which consists of large aircraft jacks and all jacks, and all types of hand tools and rolling benches, and permanent fixed benches. And we have a complete set of mechanics' tools. We have engine oil storage space. And there may be other items I can't just think of.

Q. In addition to this tell me whether you have machine tools in the machine shop?

A. Yes, sir; we have some machine tools.

Q. What would they consist of?

A. They will consist of lathe and drill press and some sheet metal equipment such as a sheet metal brake and small hand sheetmetal tools.

Q. Now, Mr. Jankovich, with respect to the business you operate there, will you tell us what particular part of this business has been affected by the Toll Road and its intrusion into the glide path?

* * * * * * *

[fol. 655] A. Actually the only part that has been affected by the Toll Road is the operation and maintenance and the

servicing of aircraft grossing over 15,000 pounds gross weight.

* * * * * * *

Q. Now when you say it has been affected, how did it affect your business?

A. It has been affected due to the fact these aircraft cannot safely use the north-south runway all the time.

Q. When they cannot use the north-south runway what is the result then of you getting this business?

A. The result is they go some place else rather than risk crosswind landing on this airport. They will probably go to Chicago, South Bend or some other airport that has adequate facilities.

Q. I call your attention to the fact that there has been testimony here now to the effect that the runway was [fol. 656] lengthened before the Toll Road went in and there were negotiations going on for the lowering of temporary obstructions to the south along the South Shore Railroad. Now assuming those obstructions had been lowered and you had the runway extended as it was at the time the Toll Road was built, I will ask you, what is the fact as to whether, under those circumstances, these aircraft in the categories which we have discussed in the previous question could have landed and taken off?

* * * * * * *

[fol. 657] A. Yes.

Q. They could have?

A. They could.

* * * * * * *

[fol. 658] Q. Mr. Jankovich, having in mind the type of obstruction which is presented by the construction of the Toll Road, as it was constructed and as it is now, I will ask you as a pilot what clearance it is necessary to use in getting over the top of the Toll Road in order to bring an aircraft in safely on the runway?

Mr. McMahan: To which the defendant objects unless the question is limited to this witness's opinion.

Mr. Thorpe: Well, it is, his opinion.

The Court: O.K. You may answer.

A. That is a variable answer, depending on the amount of wind and the amount of turbulence. I would say within a minimum of 50 feet of the traffic over the Toll Road and a maximum of 100.

* * * * * * *

[fols. 659-660] Cross examination.

By Mr. Houran:

* * * * * * *

[fol. 661] Q. When was it, Mr. Jankovich, that the Toll Road actually came into possession of this land, do you remember?

A. That the Toll Road came into possession—

Q. The Toll Road took possession of this land?

A. What land are you talking about, the property that the Toll Road sits on?

Q. Yes.

A. I don't know when they took possession but I think the Toll Road was completed in 1956 and they were a year to build through that area.

Q. Then it would be sometime during the summer or early fall of 1955?

A. About that, I think.

* * * * * * *

[fol. 662] Q. Now prior to the Toll Road there were two extensions placed on the north-south runway, isn't that correct?

A. That is right.

Q. And I think you testified there were 300 feet placed on the north end of the runway?

A. Yes, sir.

Q. And 200 feet on the south end?

A. That is right.

Q. Do you know who paid for those extensions?

A. Either the City paid for them alone or the City and the federal government matched funds.

* * * * * * *

Q. Prior to the Toll Road how many times have you flown an airplane grossing more than 15,000 pounds in the

period of time between its construction and the time you leased this property, if you recall?

A. Numerous times, I would say.

Q. Do you have any idea how many "numerous" would be?

A. No. We are flying all the time but it is hard to say. I would say a number of times.

Q. Would "a number" be between five and a hundred?

A. Well, between that.

Q. I believe you testified, Mr. Jankovich, that from the [fols. 663-670] time you leased this Airport place until the time the Toll-Road was constructed that that north-south runway was safe for all classifications of aircraft?

A. I believe I testified it was safe but marginal at times.

* * * * * * *

[fol. 671] And LEIGH FISHER, a witness for the plaintiffs, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

* * * * * * *

Q. What is your business or profession?

A. I am an airport consultant.

Q. Will you please state generally what your qualifications may be and your experience?

A. I have been the owner and operator of a business called Leigh Fisher and Associates, airport consultants since March 1, 1946. In connection with this work we have served as economic, planning, financial, management and operation consultants and advisors to over one hundred cities and governments throughout the world.

Q. Will you speak up just a little more?

A. Excuse me. In this capacity I and my associates have served as economic, planning, financial, operation and management advisors in connection with over one hundred airports for municipalities and governments throughout the world. Some of them would include, for example, Indianapolis, Evansville, South Bend, Fort Wayne, Milwaukee, New Orleans, Minneapolis, St. Paul, Los Angeles, Stock-

[fol. 672] holm, Sweden; Anchorage, Alaska; San Juan, Puerto Rico; Auckland and Wellington, New Zealand and many many others.

Q. Now with respect to the City of Gary I will ask you if you did any work for the City of Gary?

A. We worked for the City of Gary in 1948 and again in 1956.

Q. Just describe briefly from the beginning and to the end of the first operation which you worked with the City of Gary.

A. In connection with our first assignment to the City of Gary in 1947 and 1948 we prepared a market study—aviation, of the market study of the Calumet area, being Whiting, East Chicago, Hammond, Gary and its surrounding metropolitan area for the basic building area and traffic planning of the proposed Gary Municipal Airport. At that time we worked with the Board of Aviation Commissioners and engineers, Beine, Hall and Curran in viewing a master plan which they had prepared and in making some slight modifications to it with respect to general aviation and executive aircraft use.

Q. Now you speak of a master plan—you refer to a master plan, and I will hand you what has been identified as plaintiffs' exhibit number 10 and ask you to examine it.

A. Yes, sir.

Q. What is the rest of it? Look it over.

A. Yes. (Witness looks as plaintiffs' exhibit No. 10.)

Q. Now having examined plaintiffs' exhibit 10, I will ask you if this is the master plan to which you have referred [fol. 673] and with respect to the work which you say you did for the City of Gary?

A. This is the Master Plan which resulted from our work with the Aviation Commissioners and Beine, Hall and Curran.

Q. Now will you describe what work you did for the City of Gary and for whom in 1956?

A. In 1956 we worked for the City of Gary Board of Aviation Commissioners again in connection with the revision of the Master Plan—proposed revision to the Master Plan necessitated by changes in the area including—part of it was the construction of the Toll Road.

Q. You are familiar then—actually from the physical aspects—pardon me—the physical characteristics of the airport and the Master Plan as represented by exhibit 10? I say, you are then familiar with the glide slope to runway 2-20 of the Gary Municipal Airport, is that correct?

A. In 1949 in the original work that we did we were not as concerned with the glide slopes then as we were with the building area layout because engineers, Beine, Hall and Curran and the Civil Aeronautics Administration as distinct from this new agency, the Federal Aviation Agency created last year, had established that the runway lengths were adequate and we did concur with them that the glide slopes could be properly protected. By 1956, as a result of the construction of the Toll Road, we worked with the Board [fols. 674-675] of Aviation Commissioners in reviewing the development of the north-south runway, and at that time did investigate from information on file with the Board of Aviation Commissioners furnished through Beine, Hall and Curran and the Toll Road authority to the Board, as I recollect, the glide slope problems as a result of the construction of the Toll Road.

* * * * * * *

[fol. 676] Q. Mr. Fisher, have you in mind the information you have now examined from plaintiffs' exhibits number 15 and 16—I will hand it back to you—and with respect to those exhibits I will ask you if the same physical characteristics of the airport exist today as they did in 1956?

* * * * * * *

A. To the best of my knowledge they do prevail.

Q. All right. Now with that information before you, Mr. Fisher, I will ask you if you can tell the court what appeared to be the permanent limiting obstruction to runway 2-20 as it existed in 1956?

[fol. 677] A. As it existed in 1956?

Q. After the construction of the Toll Road.

A. According to the information you have presented me here in the form of these exhibits, the permanent limiting obstruction is the Toll Road, and fifteen foot clear height over the nearest moving traffic lane of the Toll Road as

prescribed by the C A A and F A A and the Bureau of Public Roads.

Mr. Purvis: To which the defendant moves the latter part of the answer be stricken. We are not charged with violation of any F A A or C A A regulations; that is not in issue in this complaint or in this case. We are charged with the violation of an ordinance, of less glide to the top of an obstruction we are accused of erecting. F A A and C A A regulations have nothing to do with the issue here, and the answer should be stricken as pertains to those regulations.

The Court: That part of the answer may go out. Now do you want to make an objection? I think the rule is for the purpose of making an objection—move to strike the answer for the purpose of making an objection. I will allow it to go out, that part that refers to any reference to the F A A and C A A; I believe they have it, and Bureau of Federal Roads—may go out.

Mr. Purvis: For the purpose of protecting the record may we have a motion to strike the answer because the witness answered before we had a chance to object. The answer having been stricken we object to that portion [fols. 678-679] just going in.

The Court: The objection is sustained.

Q. Now, Mr. Fisher, with respect to the information you have before you with these two exhibits, you say that the permanent limiting obstruction to the runway—to runway 2-20, I take it that is what is generally known as the north-south runway of the airport?

A. Yes, sir; runway 2-20 is the compass heading 20 degrees and 200 degrees; after-shortened to 2-20, common reference to runway orientation.

ing in mind the data which is before you in exhibits 15 and 16 now before this court, I will ask you if you can tell the court what the glide slope would be over the Toll Road to the existing runways as they are now and as they were in 1956?

[fol. 681] A. Yes.

Q. Mr. Fisher, how do you determine the glide slope with respect to the physical features as depicted on plaintiffs' exhibits 15 and 16, and with respect to the north-south runway?

A. A glide angle is determined in its ratio between the full lineal distance forward with respect to horizontal distance attended, and as commonly expressed, for example, as a 40 to 1, meaning 40 feet forward for one foot in vertical elevation. It is determined by a simple mathematical calculation from surveys and fixed engineering data conventionally furnished by surveyors duly licensed [fol. 682] and registered who furnish it to operational people for calculation and use.

Q. Now, Mr. Fisher, I will ask you if you have made such a calculation with respect to the elevation of the Toll Road as it now exists and as illustrated by plaintiffs' exhibits 15 and 16?

A. We have made it to a point fifteen feet over the Toll Road.

Q. Now then with respect to a point fifteen feet over the Toll Road and as disclosed by the information contained in plaintiffs' exhibits 15 and 16, I will ask you now what you find to be the glide slope over the Toll Road to the end of the runway as it now exists and existed in 1956 on the north-south runway?

Q. [illegible]

A. I am.

Q. Now again I will ask you if you are familiar with the flight characteristics of aircraft in the category of 15,000 pounds gross and over?

A. Yes, sir.

Q. Now with respect to the glide path which you have just described, and with reference to this particular category, I will ask you if the glide path you have just described would be adequate for that type of aircraft?

* * * * * * * *

[fol. 685] A. If your honor permits I have to answer this in narrative form. The operation of aircraft at any glide slope is a function of the useable runway length which rises in front of the touchdown point of the aircraft after it [fol. 686] reaches the point of impact on the runway. Therefore, a given glide slope must be measured in terms of foreground and useable runway length of the runway you are approaching to. I believe it was 27 to 1 glide slope, is marginal—it is entirely adequate for all of the lighter aircraft and marginally adequate to the existing runway for most heavier engine executive aircraft under normal, operating and crosswind conditions.

Q. Now, Mr. Fisher, you are familiar with the present length of the runways and their location with respect to the Toll Road, is that right?

A. I am.

Q. And you relate that information to the information which is exhibited in plaintiffs' exhibits 15 and 16, is that correct?

A. I have.

Q. You say you have used a figure of fifteen feet over the Toll Road in order to estimate glide angle, is that right?

A. Yes.

Q. Why did you use that figure?

* * * * * * * *

[fol. 687] A. Since January, 1949 it has been mandatory in the industry to clear any public road by fifteen feet over the edge of the nearest moving traffic lane on a public highway for an airport to be eligible for federal aid and participation in construction costs by the federal government.

has been prescribed originally by the Bureau of Public Roads and the C A A because the trucks which pass on the public roads form an obstruction thereon which must be cleared by aircraft.

* * * * * * *

[fol. 688] Q. Now, Mr. Fisher, prior to the construction of the Toll Road, and having in mind again the information, the elevations which appear on plaintiffs' exhibits 15 and 16, what was the permanent limiting obstruction to runway 2-20 to the south as it was constructed in 1956, previous to the—strike the question—it is getting too involved; I will try to simplify it.

Prior to the construction of the Toll Road what if anything might be—or could you describe as being a permanent limiting obstruction to ingress and egress to run-[fol. 689] way 2-20, or the north-south runway, as it was constructed at the time the Toll Road was constructed and previous to it—I must limit it to that. Do you understand the question?

A. I do. Prior to the construction of the Toll Road the permanent limiting obstruction to runway 2-20 was the limiting catenary height of the South Shore Railway lines.

Q. What was the extent of this South Shore obstruction?

A. To the existing runway end?

Q. Yes.

A. Prior to the construction of the Toll Road?

Q. Yes.

A. To the existing runway end, prior to the construction of the Toll Road, that catenary support height would have restricted the glide slope to approximately 38 to 1.

Q. So that from your answer to the previous question are you able to determine what effect the Toll Road had on this glide slope?

A. As I testified earlier it reduced it to 27 to 1 under the same conditions and became a permanent limiting obstruction.

Q. Now will you tell the court what practical effect would result from this change in the glide slope?

A. I testified earlier that the change in glide slope in itself is not as critical as the remaining runway length.

Q. All right. Tell us what the result would be.

A. The result would be—there are two results from it; first, the reduction of the glide slope from 38 to 1 to 27 to 1 to a measured runway length of 3,600 feet means that all [fol. 690] of your lighter type of aircraft could easily or safely accommodate—use that glide slope, but your heavier twin engine executive aircraft became marginal at that runway length and that reduced glide slope, and it depends on the pilotage, techniques and the nature of the glide slope—what underlies the glide slope.

Q. Now you talk about pilotage. And what do you mean by that?

A. When flying aircraft down a glide slope into a runway end you have the aircraft reduced in speed and in power and therefore more vulnerable to sudden changes in attitude and position. To a longer runway you have an unselected area in which to recover by the application of power thereby reduces the speed and using the longer length places the aircraft on the ground, stopping its flying speed and holding it on the runway. The placing of an obstruction placed in a glide slope, although it may meet glide slope minimums, becomes quite critical if there are turbulences or psychological hazards. In the case of any physical obstruction such as the Toll Road or any major earthworks at the landing end of a runway—crosswind runway down which the wind blows at higher speeds—because the crosswind runway is used only during high wind conditions—if the runway limitation and turbulent condition exists it causes the air to rise up and therefore the pilot will tend to raise himself up over the minimum, which wouldn't normally be done if it was just a chimney [fol. 691] or something of that type. The same conditions prevail when the obstructions are vulnerable in height as on a highway, such as automobiles and trucks. So that the practical effect is that the pilot raises the glide slope at his own discretion to avoid these unpredictable occasions. In addition to the loss of the measured length of the runway of some—I believe it was 440 feet; I would have to check my notes—when the Toll Road was constructed the City of Gary had just previously constructed 300 feet on the north end of the runway and 200 feet on the south. This was

just prior to the Toll Road's construction. When the Toll Road was constructed the change from the catenary support height on the South Shore Railroad, which would be 24 feet over the railroad track to 15 feet over the nearest lane of the Toll Road, in effect wiped out that 300 feet on the north end and in effect took 140 feet more of useable runway. May I continue in this narrative?

The Court: Yes.

A. Because as an obstruction is moved in the runway end, either an aircraft must sustain this glide slope in the runway end or must maintain the same glide slope and land farther down the runway and lose its useable length, thereby reducing its useable length.

Q. Now you say, reducing the useable length. Do you recall what the length of the north-south runway was at the time the Toll Road was constructed?

A. Approximately 3,600 feet.

Q. Now the moving in of this permanent obstruction as [fol. 692] represented by the Toll Road, I will ask you what effect it had with respect to the useable runway that then existed in the flight of aircraft in this heavier category?

A. The useable length is a function of glide slope. As testified, if any aircraft could maintain the 27 to 1 glide slope over the Toll Road as a limiting obstruction, it could use the full 3,600 feet of runway which then existed on the ground. At a 40 to 1 glide slope over the Toll Road as the limiting obstruction, a useable length of 3,080 feet would remain.

Q. Would that be adequate for aircraft in categories of 15,000 and over?

A. Not for the majority of them.

Q. With additions to the runway—that is, extending in length—would that change the picture with respect to the ingress and egress of aircraft over 15,000 pounds—that is, the available runway—available space if it was extended—if it was possible to extend it on the airport to alleviate that situation?

A. If the landing to the north—that is the approach to the south over the South Shore and Toll Road in the southerly end of runway 2-20, no southerly extension would

benefit aircraft of the heavier category, only its northerly extension, since it is at the point where aircraft touch down that fixes useable runway length, and the limiting factor is useable glide slope into the southerly end which, as I have testified earlier, for the heavier aircraft is only marginally adequate at this time. It is not possible to ex- [fols. 693-694] tend the runway farther on the north under present circumstances.

Q. Now, Mr. Fisher, I will ask you if you are familiar with what the Master Plan anticipated as an ultimate length of this runway?

• • • • • • •

[fol. 695] A. The Master Plan as prepared in 1940—the one I testified to earlier—1948—

Q. 1948.

A. 1948, and with which we worked in our original work with the City of Gary, anticipated an overall runway length of 3,900 feet for runway 2-20. Before the construction of the Toll Road the City of Gary did cause 200 feet—first, to start off: they built approximately 3,100 feet of it in the first stage. Just before the construction of the Toll Road the City of Gary did cause 200 feet more to be added to the southerly end of it, leading toward the Master Plan length to bring the Master Plan length all under construction to 3,300 feet. But at that time in an effort to alleviate the construction problems at the south end they added 300 feet more to the north end. Then in addition the Master Plan as adopted in 1948 would permit an additional 600 feet to be constructed from the present south end [fol. 696] of the runway to the Master Plan south end making thereby a measured length of 4,200 feet overall, end to end, including the Master Plan, plus 300 feet to the north —or 3,900 feet Master Plan plus 300 feet to the north. Is that a complete answer?

• • • • • • •

Q. Now, Mr. Fisher, you have testified concerning the elevation of the South Shore catenary, and assuming the South Shore catenary support as a permanent limiting obstruction prior to the construction of the Toll Road, what would the glide path be—or what glide slope could be

made to the proposed Master Plan's extended length; that is, specifically the southerly threshold?

A. Approximately 21 to 1.

Q. Now with the Toll Road construction what glide slope would then be permitted to the Master Plan's southerly extension to which you just testified?

* * * * * * *

[fol. 697] A. The South Shore support heights as I testified earlier, made it 21 to 1 to the Master Plan end, and with the Toll Road construction it reduced it to 11 to 1 from the Toll Road as the limiting obstruction to the runway end as defined in the Gary Zoning Ordinance.

Q. What did this change in the ultimate glide slope mean?

* * * * * * *

A. The change in the glide slope from 21 to 1 to 11 to 1 meant that the 11 to 1 is totally unacceptable for all types of aircraft except helicopters, and 21 to 1 is acceptable for only lighter aircraft.

Q. With respect to what length of the runway?

A. That is, the glide slope?

[fol. 698] Q. Yes.

A. My answer at that time was with respect to a glide slope with respect to an indefinite runway length.

* * * * * * *

Q. Now from an operational viewpoint and with respect to the glide slope you have just testified to, and further with the runway extended to 4,200 feet as you just testified to, what would that mean operationally?

A. Operationally I said that no aircraft except a helicopter, a rotary, one with some direct landing could operate on 11 to 1, and only lighter aircraft could operate at 21 to 1. But it means effectively when the glide slope would be changed by the pilot sometimes as he approached this specific runway and would touch down at a point down the runway, depending—the point of impact would depend on the glide slope that he elected to maintain over the obstruction.

Q. Now assuming that he maintained a glide slope of 40 [fol. 699] to 1, what would happen to the useable length of the runway of 4,200 feet?

A. Referring specifically to the Master Plan southerly end of the runway and a measured length there may be north of 4,200 feet, at the 40 to 1 glide slope over the Toll Road the only useable length from the aircraft touchdown point of 3,080 would remain, and over the South Shore catenary support as a limiting obstruction, 3,520 feet.

Q. Which of those last measurements would be acceptable to aircraft in the categories of 15,000 and over?

A. The 3,520 feet with normal obstructions—in other words, no turbulence—no undue turbulence—you always get turbulence in approaching—but without undue turbulence the 3,520 feet would be adequate for all but the major airline jet transport equipment.

Q. So now maintaining the same glide angle over the Toll Road as it now exists and did exist, say to a 4,200 foot runway, what would be the remaining useable runway left?

A. As I have testified earlier, 3,080 feet. It is the same whether you extend the runway or not. The touchdown point would be on the existing runway as it exists today at that glide slope.

Q. Now using a glide slope of 20 to 1 which you have previously testified to over the catenary on the South Shore, what effective runway would you have as it now exists?

A. As it now exists?

Q. Yes.

[fol. 700] A. 20 to 1 over the catenary support height on the South Shore to the existing runway, 38 to 1.

* * * * * * *

The Witness: I wish to correct that answer. I erred and gave an answer in slope rather than distance.

A. 5,600 feet, the full measured length.

Q. And assuming a glide slope of 20 to 1 on the Master Plan, what would be the useable runway?

A. 4,200 feet, the actual planned length.

[fol. 701] Q. That would be the total length?

A. At a 20 to 1.

Q. Now to get this straightened out I will ask you the same question with respect to over the Toll Road?

* * * * * * *

Q. Assuming the 4,200 foot runway and using a 20 to 1 glide angle over the Toll Road what would be the useable length of the runway?

A. 3,860 feet approximately.

* * * * * * *

[fol. 702] Cross examination.

By Mr. McMahan:

* * * * * * *

Q. Do you know what the length of the north-south runway of the Gary Municipal Airport was on March 23, 1950?

* * * * * * *

Q. Do you know when the 300 feet extension to this runway was constructed?

A. Not the specific date of construction. I recall that it [fol. 703] was after our last engagement with the Board—after our finishing engagement in 1951 I believe I recall since we served the Board, my memory tells me three years after the airport was placed under construction initially and prior to our 1956 work. As I recall it was 1954 or 1955.

Q. That is the same time the 200 feet was constructed to the south?

A. Yes, sir; it was prior to the construction of the Toll Road.

Q. I believe you testified you needed to construct this 30 feet to the north in order to clear the obstruction to the south before the Toll Road was built, is that correct?

A. Yes, sir; I did.

Q. What were those obstructions to the south at that time that required that 300 feet to be built?

A. They would be the South Shore catenary supports.

Q. Weren't some South Shore construction lights also erected?

A. Well, my understanding is these obstruction lights go on control by the City of Gary, placed there by the City of Gary and not by the South Shore.

Q. Do you know when they were placed there?

A. I don't of my own information. I recall they were placed there before the time the airport was placed in operation.

Q. Do you remember or do you know when the 3,100 feet of runway was built?

A. I don't know—I don't have the information with me.

Q. But it was early in 1948 or 1949 or 1950, in that area?

A. Just prior to 1950.

Q. Just prior to 1950?

A. As I recall.

[fol. 704] Q. You think the obstruction lights of the South Shore were constructed about the same time?

A. About the same time.

Q. And they have been in existence ever since?

A. To the best of my knowledge.

* * * * * * *

Q. Do you know what the elevation of those obstruction lights on top of the poles are with reference to the elevation of the runway?

A. We have them in the record, and I probably could find them. We weren't too concerned because at the time of that, before the 1956 engagement, we proceeded in extended conferences on the necessary refurbishing of the South Shore Railway. They were to lower the catenary to the minimum height at the time to clear up that south approach which was not done officially because of lack of money.

[fol. 705] Q. That didn't take place in 1956?

A. No, sir; because in 1956 it was too late to raise them. The Toll Road had been constructed and if anything the obstruction lights would have had to have been raised.

* * * * * * *

[fol. 706] Q. You have testified that planes over 15,000 pounds gross would use the north-south runway from the south with marginal safety, is that correct?

A. Yes, sir.

Q. Do all planes landing and taking off use the north-south runway?

A. No, sir.

Q. Have you conducted any surveys to determine the percentage of flights coming into the field from the north and taking off to the north as against planes coming in from the south and taking off to the south?

A. We have, and Mr. Jones has information of that type that he has compiled.

[fol. 707] Q. But you have no—

A. I have knowledge of the results rather than having calculated it myself.

Q. A plane takes off one way or the other because of the prevailing wind conditions?

A. They do, sir.

Q. Planes will take off to the south when the wind is from the south, is that right?

A. Yes, sir; over— May I qualify that with a narrative response?

Q. Answer the question if you can.

A. The wind is a limiting factor only when it exceeds a given velocity. Winds having a maximum of three or four miles are not critical. Winds over that, even up to seven miles per hour are not critical for almost any aircraft with a pilot of reasonable competence. Therefore, no taking off or landing is normally done on the shorter runways on an airport. Normally the pilot elects to take off on the longest runway under any wind circumstances which would permit it. Therefore, in response to your inquiry, if under wind conditions requiring it, when the velocity exceeds— at this point discretion comes in because lighter aircraft with tail wheel must take off into the wind and land, of course, into the wind at most landing velocities of ten miles an hour and over. but for aircraft change in configuration when nose wheels are installed and when the aircraft gets heavier, their wind violence increases—crosswind violence [fols. 708-715] increases up to a point normally considered in the industry up to fifteen miles per hour crosswind component. For any heavier type airline aircraft we ride on regularly in scheduled service, normally they switch over to the crosswind runway.

Q. The point you touched on in direct examination I want to clarify. In other words, a plane grossing over 15,000 pounds would normally use the northwest-southeast runway

because of its greater length as long as wind conditions necessitated such a takeoff into the wind?

A. Yes, sir.

Q. And you testify the break in the wind as to which runway they would use would be about fifteen miles an hour?

A. Depending on the wind—crosswind and landing gear configuration of the aircraft and, of course, considering the pilot's ability.

Q. At this time then you would not say that the Gary Airport was rendered completely useless for landing or takeoff for planes grossing over 15,000 pounds?

A. It has not been rendered totally useless for aircraft of that weight.

* * * * * * *

[fol. 716] Redirect examination.

By Mr. Thorpe:

Q. Now, Mr. Fisher, you have testified as to the effect of the Toll Road with the runway as it is now and the runway as it would be if extended. Now I will ask you this question: what if anything do you know of that could be done which would alleviate or cure this marginal use of the north-south runway which is created by the Toll Road?

* * * * * * *

[fol. 717] A. The question as I will take it was asked is what could be done to this airport with respect to improving the situation which has now come to pass as a result of the Toll Road construction?

Q. Yes.

A. That is the question to which I will address myself. There is nothing that can be done that is economically feasible in my judgment.

Q. Now you said in answer to Mr. McMahan's question in effect that it didn't destroy the usefulness of the airport. This catenary, say, on the north-south runway how does it affect the operation of the airport?

A. I believe my testimony was to the effect that this reduction of glide slope and useable length of the north-south runway didn't render totally useless the Gary Municipal

Airport for aircraft weighing 15,000 pounds or more. I said that because the wind conditions requiring the use of the north-south runway, according to our findings in our November, 1956 report to the Board of Gary Aviation Commissioners, are approximately eleven percent of the time we have cross-wind component in excess of fifteen miles an hour on the northwest-southeast runway. Therefore, theoretically the airport would be available for use unrestricted eighty-nine percent of the time by these same aircraft. In practical effect what this means is, there is a reduction in the desirability of the use of an airport because when a person takes off from St. Louis or New York or Minneapolis or Denver coming to the Chicago area air- [fol. 718] ports he doesn't know that the wind conditions when he arrives here will be over fifteen miles an hour crosswind or not. He may have some idea from the Weather Bureau reports, but there is no way by which he can know over a two or three or four hour span flying period what the practical change in the weather will be. As a result he will elect, if he has knowledge of the critical conditions with respect to the crosswind runway, if there is any question of the pilot in his own ability to safely land his aircraft, he will select another location for his point of touchdown. Now that is speaking with reference to the transient pilot, the person who passes through and brings commerce and industry and patronage to your fixed base operator. There is also the effect, however, that the man who lives—or the company aircraft—who resides in the Chicago area, or the southern part of it, and owns heavy twin aircraft that executives use—that is, heavy, being in excess of 15,000 pounds, will, given possibility, locate their aircraft and make their investment and place their site of basing their aircraft on another airport if the conditions are better. For example, we work in this area for Rockford, Illinois, as well as other areas, and we have found specifically that—I believe it was International Harvester elected that after investigation to base their aircraft at Rockford instead of Gary because of runway conditions. Now, therefore, the only thing I can testify on of my own knowledge and experience is the fact that depending on the circumstances [fol. 719] the reduction in usefulness cannot be less than

eleven percent but can vary under the circumstances as high as a total loss of certain types of business where there are acceptable alternatives, and in this case Rockford and DuPage County and some of the others.

• • • • • • • •

[fols. 720-721] Q. Mr. Fisher, with respect to this heavy aircraft, and based upon your previous testimony, I will ask you if you know what can be expected in the industry with respect to an eleven percent limitation of the use of aircraft over 15,000 pounds?

• • • • • • • •

A. In an eleven percent absolute limitation means, as I testified earlier, that if there is any alternative, the owners and operators of the affected aircraft will select another location for basing and operating to obtain dependability of usage. If I may explain here this dependability of ... age—

• • • • • • • •

[fol. 722] Q. Well, Mr. Fisher, I will try it this way: assuming an aircraft owner who has an aircraft in the 30,000 pound gross category, an executive owner, and he is confronted with an airport, a two-runway airport, which has a crosswind runway such as the north-south runway on the Gary Airport, I will ask you from an economic standpoint what effect it would have upon that owner if he attempted to base his aircraft on the Gary Airport under those conditions?

• • • • • • • •

A. Insurance provisions impose upon operators of aircraft in excess of 15,000 pounds, as well as other aircraft, used in the civil air transport field for non-airline operation—which is commonly referred to as general aviation or [fol. 723] executive aviation—frequently and commonly impose on the heavier aircraft equipment regulations with respect to the type of operations that they shall be permitted, the type of airports they may operate into and out of, the type of pilots and their experience and ratings and standings that shall be permitted to fly them, because of the excessive liability which has come to be recognized in

aviation insurance, and underwriters have, as a result of serious accidents, informed corporate executives this not only does not prevail in all of the executive aircraft—the insurance regulations do not prevail in all of the cases of executive aircraft, they usually prevail in the case of heavier twin engine aircraft of the newer or faster type, and by newer and faster I include the World War Two reconstructed aircraft which have been made useful for executive aviation transportation. As a result they will now standardize conditions in insurance policies and which will grant the carrying of certain specified important officials of the various companies, which as a result as a normal circumstance, it is recognized that where airport limitations do exist and no satisfactory alternative airport sites are available upon which to base the aircraft, the company will base its aircraft on a restricted airport or sub-standard airport with their pilots and will subsequently fly off empty —no gas, no pay-load—picking up their load at an unrestricted airport. Therefore, there is an economic factor which is beyond the safety factor when the case of alterna-
[fol. 724] tive locations to base such an aircraft are available.

* * * * * * *

[fol. 725] And JAMES B. JONES, a witness for the plaintiffs, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Thorpe:

* * * * * * *

Q. And I will ask you, what is your profession?

A. I am Vice-President of Leigh Fisher and Associates, airport consultants.

Q. What is your profession?

A. I am an airport consultant specializing in aviation economics.

* * * * * * *

[fol. 726] Q. Now, Mr. Jones, I will ask you if you are familiar with the Gary Municipal Airport?

A. Yes, sir.

Q. And are you familiar with its location in the community?

A. Yes, sir.

Q. And with respect to its location I will ask you if you are familiar with the economic aspects pertaining to this airport to the aviation industry?

A. Yes, sir.

Q. What is the fact as to whether you have made an analysis of the economic circumstances surrounding the Gary Municipal Airport?

• • • • • • • •

A. Yes, sir.

[fol. 727] Q. When did you make that analysis?

A. In 1956 in connection with our 1956 study.

Q. Have you made any investigation concerning that matter since?

A. Only very cursory, briefly, to bring it up—certain data to bring it up to date at the present time.

• • • • • • • •

[fol. 728] Q. Well, I will ask you from your investigation of the circumstances of the economic conditions surrounding the Gary Municipal Airport if you know what types of aircraft would use that airport, assuming that the north-south runway had no limitations on it as of the year 1956 at the time when the Toll Road was constructed?

A. The Gary Municipal Airport is a general aviation airport; that is, it is designed primarily to meet demands of non-airline civil aviation. These civil aircraft can generally be divided—classified into four categories. Class 1 might be defined as general aviation aircraft having a total rated horsepower from all engines of having more than 750 horsepower and having more than one engine on these aircraft. The class 2 aircraft, the second category, could be defined as those aircraft having more than one engine to develop less than 750 horsepower per engine. The class 3 category might be defined as single engine aircraft three place or over; and class 4 as single aircraft as class 1 and 2 place. So in general the size of the aircraft would vary inversely to the class as I have set them up.

Q. Now with respect to weight, what classification would [fols. 729-907] you say the 15,000 pound planes would fall into?

A. Those aircraft would all fall into one class category; that is, multi-engine aircraft developing more than 750 horsepower per engine.

Q. Assuming we have a runway such as has been described here as the north-south runway where due to obstructions on the airport such as have been described as being the Toll Road which would result in a marginal use—I believe that is the term—a marginal use of the airport as a result of this runway being so afflicted, what particular class of operation of the aircraft would be affected?

A. The only class of aircraft adversely affected by the obstructed approach to 2-20 is class 1 type of aircraft.

* * * * * * *

[fol. 908] STANLEY M. SHARTLE, called as a witness by the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Winfield L. Houran:

* * * * * * *

[fol. 909] Q. What is your business, or occupation?

A. Professional engineer.

Q. And I will ask you whether or not you hold any registration in the State of Indiana.

A. I am registered professional engineer, land surveyor.

Q. How many years experience do you have as a registered engineer, Mr. Shartle?

A. Ten years as a registered engineer.

Q. And how many years experience as a registered land surveyor?

A. Fifteen.

Q. What is a registered land surveyor?

A. A registered land surveyor is a person who is authorized by the Indiana Board of Registration for Professional Engineers and Land Surveyors to practice land survey in Indiana.

Q. What is a registered civil engineer?

A. Is a person who is authorized to practice professional engineering within the State of Indiana by the Indiana Board of Registration for Professional Engineers and Land Surveyors.

Q. Have you ever held governmental offices?

A. Yes, I served one, two year term, as Surveyor of Hendricks County; also two years of another term in the same office.

• • • • • • •

[fol. 910] Q. By whom are you now employed Mr. Shartle?

A. The Indiana Toll Road Commission.

Q. How long have you been employed by them?

A. Six years.

Q. Since 1954?

A. Yes.

• • • • • • •

[fol. 911] Q. Now, back in the years 1954, 1955, 1956, I will ask you whether or not you were familiar with the area of the Gary Municipal Airport located in Lake County?

A. Yes, I was.

Q. How were you familiar with it Mr. Shartle?

A. I made occasional field inspections of the progress of the work in order to see if additional right of way was required along the route.

Mr. Thorpe: What was that, the last?

A. I made field inspections of the right of way during construction.

Q. And you were also familiar with the north-south run-[fol. 912] way as it existed immediately prior to the construction of the Toll Road, is that right?

A. Yes.

• • • • • • •

Q. I will ask you if you have ever conducted a survey of the Gary Municipal Airport, specifically in respect to the north-south runway?

A. Yes, I have.

Q. When was that done, or, give us the dates you were out there.

A. It was commenced on April 23rd, 1958 and was finished last month.

Q. Now, did this survey also include survey of obstructions located at the north and south end of this runway?

A. Yes, it did.

Q. What was the purpose of this survey, Mr. Shartle?

* * * * * * *

[fol. 913] A. The survey was made at the request of the General Counsel of the Indiana Toll Road Commission.

Q. And what did you subsequently do with the notes and figures you took out there when you made these surveys?

A. They were abstracted in the form of plan and profile.

* * * * * * *

Q. All right, now explain to the court, Mr. Shartle, just what was done and how this survey was conducted, if you will.

A. On the first day we measured the distance from the south end of the north-south runway at the Gary Airport to the obstruction lights which are located on the south side of the Chicago, South Shore and South Bend Railroad, and also measured the width of the existing runway.

Q. What was done the next time?

A. On the next day we measured the height of certain obstruction lights south of the south shore railroad.

Q. How was that done?

A. That was done by a combination of spirit leveling and triangulation.

[fol. 914] Q. What is spirit leveling?

A. Is a system by which the difference in elevations of two points may be determined.

Q. By a spirit level?

A. Or surveyor's level.

Q. What was done after that?

A. The elevation of the south end of the north-south runway was determined.

Q. How was that determined?

A. That was done by leveling from a bench mark located on the Toll Road.

Q. What was done after that, Mr. Shartle.

A. On March 7th and 8th, 1960.

Mr. Thorpe: 1960?

A. 1960, yes, I measured the length of the north-south runway and ascertained elevations of the runway at the center portion and at the north end; also measured the elevation of the end location of the Industrial Highway, and also determined the position and elevation of certain points on the Tanktainer Welded Products building.

Q. Where is this building located generally in respect to the north-south runway of the Gary Municipal Airport?

A. It is on the center line of the north-south runway projected northward.

Q. All right, when did you next go to the Gary Municipal Airport?

A. On April 26th.

[fol. 915] Q. Who was with you on that day? What year?

A. In 1960, with me was Ward D. Hobson, a registered engineer.

Q. Have you gone there since that date?

A. Not to make a survey. We have passed by the site.

Q. Now, what then was done with the figures, and notes, you made as a result of these surveys in 1958 and subsequently?

A. Those were put down in final form of plan and profile; also plan and elevation.

Q. And they were put down on what?

A. They were put down on linen tracing cloth.

Q. Mr. Shartle, I will hand you what has been marked, for purpose of identification, Defendant's Exhibit "A", and ask you if that is a true and exact copy of these figures that you obtained as a result of these surveys?

A. Yes, it is a true and exact copy of our measurements as we obtained them at the site.

Q. Now, you stated that you were familiar with the north-south runway of the Gary Municipal Airport prior to the Toll Road, is that correct?

A. Yes.

Q. And, can you say, Mr. Shartle, with reasonable certainty, the physical aspects, north, and south, of the Gary Municipal Airport, were essentially the same when you made the survey as they were prior to the construction, during the construction of the Toll Road?

A. Yes, to the best of my knowledge they are the same.

Q. Now, this is, I think you testified, a scale drawing, is that correct?

[fols. 916-917] A. Yes.

Q. What do you mean when you say it is a scaled drawing?

A. That means it is drawn in approximate proportion to the actual construction and characteristics on the ground.

Q. Does the drawing have two different scales?

A. Yes, the scale of the plan represents one inch on that plan, represents one hundred feet on the ground.

Q. Now, you say this is a Plan and Profile drawing?

A. Yes.

Q. I see what appears to be two separate drawings on this exhibit, Defendant's Exhibit "A", which is the plan drawing?

A. The top drawing is the plan, which is a view as one might get from the air, high altitude.

Q. What is the bottom drawing on Defendant's Exhibit "A"?

A. That is the Profile which one might see if the north-south runway were cut with a knife, lengthwise, then viewed from the side.

Mr. Houran: Your Honor, the defendant will now offer into evidence Defendant's Exhibit "A".

* * * * * * *

Mr. Thorpe: No objection.

The Court: Defendant's Exhibit "A" is admitted in evidence.

* * * * * * *

[fol. 918] Q. Now, Mr. Shartle, will you step down here please. You testified, I think, that the top of that drawing is a view looking down on the north-south runway, is that correct?

A. Yes.

Q. That's what you call the Plan Drawing?

A. Yes, that's right.

Q. What is the scale of that drawing?

A. One inch equals one hundred feet.

Q. Does that plan then show the scale length of the runway?

A. No, no, the scale is shown on the lower drawing.

Q. I notice a dotted line running down what appears to be the center of the north-south runway on the exhibit, I will ask you what that indicates?

A. That is the center line between the edges of the runway.

Q. In other words, on this drawing, Exhibit "A" there is a broken, or dotted line, that is an imaginary line, is that correct?

A. That's right.

Q. Now I see the figures 0 plus 00 plus appear to be at the north end of the north-south runway, what do they mean?

A. That means that that is the beginning point of our measurements from the north end of the runway northward; zero plus zero is standard engineering designation meaning you start at no feet.

Q. I also notice the same figures at the south?

A. South end of the runway is the point from which we began our measurements to the structure to the south of [fol. 919] the runway.

Q. Now, Mr. Shartle, once again directing your attention to the north end of the runway, I see several lines running in a generally northwest direction labeled Industrial Highway, Route 2, is that correct?

A. I believe that is Route 12.

Q. What do those lines represent?

A. Those lines represent the north edge and south edge of the existing pavement of the State Highway.

Q. Does this drawing indicate how wide that highway is?

A. No, it doesn't.

Q. Now, I notice on this drawing here, the center line projected crosses another broken line at the figure 6 plus 81, what does that figure mean?

A. That means from the north end of the north-south runway it is 600 feet, tape lengths, plus 81 feet, or a total of 681 feet from the north end of the runway to the center line of the Industrial Highway.

Q. Then going a little farther north I notice on this same broken line, which you have testified is the center line projected, the figure 8 plus 43, what does that mean?

A. That means it is the distance from the end of the runway.

Q. North end?

A. Yes, north end of the runway to a point opposite a certain power pole is 843 feet north of the north end of the runway.

Q. And in which direction does this power pole lie from the projected north-south center line of the runway?

A. West.

[fol. 920] Q. Does the drawing indicate how many feet?

A. The pole is 318 feet west of the center line of the runway projected.

Q. Now, continuing a little farther north, Mr. Shartle, I notice the figure 9 plus 75 on the projected center line of the north-south runway, what does that mean?

A. That means that it is 975 feet from the north end of the north-south runway to a point opposite a smokestack mounted on top of the Tanktainer Building.

Q. Does that rectangle indicate anything in particular?

A. That rectangle represents the outline of the Tanktainer Company building.

Q. Do you recall what this building is constructed of?

A. I believe it is made of block, and has a brick front office, I believe.

Q. Now, at the south end of your Plan Drawing you have projected the center line, is that right?

A. Yes.

Q. What does that cross, according to your drawing?

A. The center line projected crosses a military road.

Q. Now, you say a Military Road, is that the same type road located south of the south end of the north-south runway?

A. Yes, it is.

Q. What type road is it?

A. That is a road constructed of bituminous materials. I believe it is used for access to some kind of government installation.

Q. Is it what is called a two lane road?

[fol. 921] A. Yes, it is.

Q. When you say bituminous material, you mean some type of hard-top surface?

A. Yes. Some people call black-top.

Q. Continuing on south along the center line projected of the north-south runway plan, what is the next obstruction the center line crosses?

A. The Indiana Toll Road.

Q. And following the Toll Road, Mr. Shartle, what then does the center line projected cross?

A. The Chicago South Shore and South Bend Railroad.

Q. All right, now, I believe you testified before that the lower drawing is Profile, is that correct?

A. Yes.

Q. How did you say that was taken?

A. That is what one might see if a knife were drawn along the center line of the North-South runway so that if the runway was split open in order to open it up so that you look in the side of it.

Q. Does this Profile, Mr. Shartle, show the Tanktainer Building?

A. Yes.

Q. Does it show it at the same relevant location as the Plan Drawing shows it?

A. Yes, it does.

Q. Does this Profile Drawing also show the end of the north end of the North-South runway?

A. Yes.

[fol. 922] Q. Now, I notice that you have drawn several dotted lines and I will ask you to explain those dotted lines to the court, at the north end of the North-South runway on the Profile portion of Defendant's Exhibit "A"?

A. Those dotted lines represent glide slopes drawn from the top of one of the smokestacks fastened to the top of the Tanktainer Company building.

Q. Where does the lower dotted line end?

A. At the north end of the North-South runway.

Q. You knew the height of the smokestack, is that correct?

A. Yes.

Q. You also knew the distance the smokestack was north of the north end of the North-South runway, is that correct?

A. Right.

Q. With those two figures was it possible to compute the glide slope?

A. Yes.

Q. How was that done, the glide slope?

A. It was computed by dividing the horizontal distance between those two points by the difference of their elevations.

Q. What then was the glide slope between those two points?

A. 28.4 to 1.

Q. All right, Mr. Shartle, I notice directly above that another broken line starts at the same point as the one previously mentioned, and I will ask you what that represents.

[fol. 923] A. That represents a glide slope drawn from the top of the same smokestack drawn on a forty to one glide slope to where it intersects the surface of the north-south runway.

Q. How did you compute that angle?

A. That angle was computed in the same manner as the previous glide slope.

Q. Now, does your drawing indicate the length of the runway running south of where that forty to one dotted line intersects the north-south runway?

A. Yes, it shows that distance.

Q. What is that distance?

A. 3,224.5 feet.

Q. Mr. Shartle, what does your drawing indicate the total length of the north-south runway is?

A. 3,605.5 feet.

Q. I will ask you, Mr. Shartle, whether or not the Profile Drawing on Defendant's Exhibit "A" indicates at the south end of the runway any type of obstruction light?

A. Yes, it does.

Q. Does your drawing, referring once again to the south end of the Profile, indicate the distance south of the south

end of the north-south runway that these lights are located?

A. Yes, it does. It gives the distance of two of the four lights included in our survey.

Q. Which two lights are they?

A. The two obstruction lights nearest to and west of the center line of the north-south runway projected.

[fol. 924] Q. One light is east of the north-south runway, projected, is that correct?

A. No, both of these are west.

Q. Now, how many feet south, of the south end of the north-south runway, is the farthest obstruction light?

A. One thousand four hundred forty feet (1,440).

Q. Now, that is indicated on your drawing as being 14 plus 40, is that right?

A. That's right.

Q. Now, I notice what appears to be another obstruction light on this Profile, and ask you how far that light is from the south end of the north-south runway?

A. It is one thousand four hundred thirteen (1,413) feet.

Q. Now, Mr. Shartle, I notice on your drawing there are several dotted lines, would you explain the top one to the court please?

A. The top dotted line represents the glide slope of 40:1 drawn from the first obstruction light west of the north-south runway center line, projected.

Q. Now, in which general direction is this line drawn?

A. Drawn from the south to the north, intersecting the surface of the north-south runway.

Q. Now, Mr. Shartle, does your drawing show the number of feet of runway left north of this line of intersection?

A. Yes, it does.

Q. How many feet remain?

A. Two thousand four hundred fifty-eight and five tenths (2,458.5) feet.

[fol. 925] Q. Mr. Shartle, referring once again to the Profile Drawing of Defendant's Exhibit "A", I will ask you what the next dotted line refers to, and where does it start?

A. It starts at the top of the first obstruction light situated west of the runway center line, projected, and is drawn to the south end of the north-south runway.

Q. Once again, knowing the height of the obstruction light the distance south of the end of the north-south runway were you able to compute the glide slope between these two points?

A. Yes, I was.

Q. How was that done?

A. That was done by dividing the distance from the south end of the north-south runway to the obstruction light by the difference of the elevations of the two points.

Q. And what was the glide slope, as you found it to be?

A. 21.7 to 1.

Q. Now, Mr. Shartle, immediately under this dotted line I see another dotted line, would you explain that line to the court, please?

A. That is the glide slope drawn from the uppermost point of the first catenary support pole west of the runway, the center line, projected, drawn to the south end of the north-south runway.

Q. And were you able to compute that glide slope?

A. Yes.

Q. Was that done in the same manner as you have heretofore described?

A. Yes, it was.

[fol. 926] Q. What is the glide slope?

A. 24.4 to 1.

Q. Now, immediately under that dotted line, or broken line on Defendant's Exhibit "A", referring to the Profile part of the drawing, I notice another broken line, what does that line indicate, Mr. Shartle?

A. That is a glide slope drawn from the uppermost wires on the first catenary support pole west of the runway center line projected, and drawn to the south end of the north-south runway.

Q. And were you able to compute the glide slope for that dotted or broken line?

A. Yes.

Q. What was that?

A. 33.2 to 1.

Q. All right, now, Mr. Shartle, directing your attention to the southernmost point of this Profile Drawing, I see what appears to be an electrical transmission line; describe to the court what that is.

A. That is a power transmission pole owned by Northern Indiana Public Service Company.

Q. Do you know how many wires are on that pole?

A. I count twenty-three.

Q. Now, immediately north of that pole appears an obstruction light, is that correct?

A. Yes.

Q. Immediately north of the obstruction light is what appears, you have described as being a catenary system, is that correct?

[fol. 927] A. Yes.

Q. What is a catenary system, what does it do?

A. Catenary system supports the current carrying wires that powers the vehicles on the Chicago South Shore and South Bend Railroad.

Q. Are there two systems there?

A. Yes, one for each track.

Q. Is this double track?

A. Yes.

Q. Your drawing also shows a cross section of this track, is that correct?

A. Yes, it does.

Q. Now, going a little farther north, Mr. Shartle, I see, I guess you call it, design, labeled "pole", what does that represent?

A. That represents the field or embankment upon which the end of the east-west Toll Road is constructed.

Q. Does your drawing show the number of feet south of the south end of the North-south runway that Toll Road is located?

A. Yes, it does.

Q. What part of the Toll Road is measured in obtaining that figure?

A. The north edge of the westbound pavement.

Q. How many feet is this north edge south of the south end of the north-south runway?

A. One thousand and forty-three (1,043) feet.

Q. Mr. Shartle, I will ask you whether or not your Profile [fol. 928] of the Toll Road shows the height at this point?

A. Yes, it does.

Q. What is that elevation?

A. Six hundred thirteen and one tenth (613.1) feet.

Q. Does your Profile shows the height of the south end of the north-south runway?

A. Yes.

Q. What is the height?

A. Five hundred eighty-eight and five tenths (588.5) feet.

Q. I now notice a dotted, or broken line, running from the north edge of the Toll Road to the south end of the north-south runway, and I will ask you to explain that line.

A. That is a glide slope drawn from the north edge of the westbound pavement of the Indiana east-west Toll Road to the south end of the north-south runway.

Q. Now, knowing those two items, and the distance between them, was it possible to calculate the glide slope between the two points?

A. Yes.

Q. Did you do that?

A. Yes.

Q. What did you find to be the glide slope?

A. 42.4 to 1.

Q. When did you testify, Mr. Shartle, you made your last survey at Gary Municipal Airport?

A. April 26th, 1960.

Q. What was the purpose of making that survey?

[fol. 929] A. That was made at the request of the General Counsel of the Indiana Toll Road Commission.

Q. What did that survey consist of?

A. That consisted of establishing the size, position and elevation of some of the catenary poles and transmission poles.

Q. And when did you say this was done?

A. April 26th, 1960.

Q. Who was with you when you made that survey?

A. Howard B. Wodock.

Q. How was it made?

A. It was made by a tape and stadia survey in which certain distances and angles were observed, and then the application of the principle of geometry and trigonometry entered into it.

Q. Did you reduce the figures to any type drawing?

A. Yes, I did.

Q. What type drawing was this you made?

A. I drew a Plan and an Elevation on the same sheet.

Q. All right, I now hand you what has been marked for purposes of identification, Defendant's Exhibit "B", and ask you if this is the drawing to which you have referred?

A. Yes, this is the drawing.

Q. Now, in that drawing, what is the scale, Mr. Shartle?

A. The uppermost part, which is the Plan, is one inch equals one hundred feet. The scale of the Elevation is, one inch equals twenty feet.

[fol. 930] Mr. Houran: Now, if the court please, the defendant will offer in evidence what has been marked for purposes of identification, Defendant's Exhibit "B".

. . . . . .

[fols. 931-932] The Court: There being no objection, Defendant's Exhibit "B" is admitted in evidence.

. . . . . .

[fol. 933] Q. Now, Mr. Shartle, would you step up by the drawing once again. Would you describe to the court, Mr. Shartle, what the drawing is? at the top of Defendant's Exhibit "B".

A. That is a Plan of the area from the south end of the north-south runway southward to the transmission line belonging to Northern Indiana Public Service Company.

Q. And it is similar to the Plan you have described that is shown on Defendant's Exhibit "A", is that correct?

A. Yes, it is.

Q. Now, would you describe to the court what the lower drawing is on Defendant's Exhibit "B".

A. It might be referred to "An Elevation", it is the view one might get by standing on the north-south runway and looking south along the center line of the runway.

Q. Now, I will ask you whether this elevation contains the Toll Road?

A. No, it does not.

Q. Would this, then, be a true and correct representation, looking south, of these lines prior to the construction of the Toll Road?

A. Yes, it would be.

Q. Now, Mr. Shartle, I will ask you whether or not your drawing shows, in scale, and in elevation, the end of the north-south runway of the Gary Municipal Airport?

A. Yes, it does.

Q. Would you point that out to the court, please?

A. This dash line here.

[fol. 934] Q. And there are two figures on that line, is that correct?

A. Yes.

Q. What are those figures?

A. Each figure is fifty.

Q. Representing what?

A. Representing the width on each side of the center line of the runway to the edges of the runway.

Q. That is, once again, the north-south runway?

A. Yes, it is.

Q. Making a total of one hundred feet in width, is that correct?

A. Yes.

Q. Now, I will ask if your drawing shows one or more of the catenary support poles used by the South Shore Railroad to operate their catenary system?

A. Yes, it does.

Q. Are those poles labeled as such, or is there anything distinguishing about them?

A. In order to distinguish the catenary poles from the other data shown I have lettered each with the letter "S" as shown.

Q. Do you have a legend some place that refers to the letter?

A. Yes, the legend is in the lower lefthand corner of the sheet.

Q. What does that show "S" as representing?

A. "S" represents the Chicago South Shore and South Bend Railroad pole.

Q. Do you also show on this elevation drawing, Defendant's Exhibit "B", the Northern Indiana Public Service [fol. 935] Company's electrical transmission line?

A. Yes, we show three poles.

Q. How is that designated?

A. Those poles are designated by the letter "N".

Q. What does that letter represent, according to your legend?

A. "N" represents poles owned by Northern Indiana Public Service Company.

Q. Now, I will ask you, Mr. Shartle, whether or not your elevation drawing on Defendant's Exhibit "B" shows any obstruction lights?

A. Yes, it does.

Q. How are they designated?

A. Obstruction lights are designated by the abbreviation for the word "obstruction", obs.

Q. They appear as such on your legend, is that correct?

A. Yes, and each pole is so designated on the drawing.

Q. Now, each of these various poles contain an elevation figure, is that right?

A. Yes.

Q. I also notice what appears to be lines drawn on this elevation, is that correct?

A. Yes.

Q. And they appear to be horizontal lines?

A. Very nearly horizontal.

Q. What do they represent?

A. Approximate locations of wires suspended by the poles.

Q. On what systems?

A. On Northern Indiana Public Service Company power transmission line; on the line of obstruction light poles, and on the line of catenary support poles owned by Chicago [fol. 936] South Shore and South Bend Railroad.

Q. Now, those lines are not actually to scale, are they?

A. No, the width of the line is not.

Q. But the length is, in relation to pole support?

A. That's right.

Q. What is the number of all types of lines, Mr. Shartle, at the point where the center line of the north-south runway, projected, intersects these two described systems?

A. Including the third pole line?

Q. Yes, everything.

A. At the point where the center line of the north-south runway is projected southward, there are thirty-six wires, not all of which are shown on this drawing, because in lines, in the same horizontal plane, the back wires would be hidden.

Q. I notice you point to other wires, what does that include?

A. That includes power transmission wires, communication wires, trolley wires, cables.

Q. Are there cables there?

A. Yes.

Q. How many, do you know?

A. I should say more than half of the wire there on those poles would be considered cable.

Q. What do you consider cable?

A. I don't have an exact definition, but I would say any wire with a diameter greater than perhaps one-quarter inch I might consider to be cable.

[fols. 937-939] Q. What is this line at the very bottom of Defendant's Exhibit "B", that you list as "Datum 550 feet"?

A. That is a horizontal line 550 feet above sea level, which is placed on the map in order to give some basis for measuring up to the various points on the elevation drawing for scale purposes.

(Mr. Shartle returns to witness chair.)

Q. Mr. Shartle, you have testified as to several glide slopes, or glide angles, contained on Defendant's Exhibits A and B, I will ask you whether or not you have reduced these angles, heights, or slopes, in chart form?

A. Yes, I have.

Q. I hand you what has been marked, for purposes of identification, Defendant's Exhibit "C", and ask you if this

is the chart you prepared from these angles, heights, elevations?

A. Yes, it is.

Q. What does that exhibit show?

A. This exhibit shows the glide slopes from various structures both south and north of the north-south runway in Gary to the ends of the north-south runway.

Q. That is the original instrument?

A. Yes, this is the original drawing.

Mr. Houran: The defendant now offers into evidence what has been identified as Defendant's Exhibit "C".

Mr. Thorpe: No objection.

The Court: Defendant's Exhibit "C" may be admitted in evidence.

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[fol. 940] Q. This is a chart, isn't it?

A. Yes, I refer to that as a chart.

Q. For all these angles you made the calculations yourself, isn't that correct?

A. Yes, they were.

Q. I will ask you whether or not Defendant's Exhibit "C" shows any glide slopes or angles that are not contained on Defendant's Exhibit "A"?

A. Yes, it does.

* * * * * * *

Mr. Houran: You may cross examine.

Cross examination.

By Straley Thorpe:

Q. You are not a pilot, are you?

A. No.

Q. You don't know very much about aviation?

A. No.

Q. As a matter of fact I believe you stated you don't know anything in particular about aviation, outside of you have seen airplanes?

A. I have ridden in them is about as far as my knowledge goes.

[fol. 941] Q. I will ask you if you didn't have this question asked you: Question. How did you say that was taken? To that question you made the following answer: Answer: That is what one might see if a knife were drawn along the center line of the north-south runway so that if the runway was split open in order to open it up so that you look in the side of it. You made that answer, did you not?

A. The answer isn't exactly right.

Q. I didn't ask you that, you made that answer?

A. Yes.

Q. Now, as a matter of fact, Mr. Witness, the representation on the bottom of this Exhibit "A" is ten times exaggerated isn't it?

A. Yes, it is.

Q. So that the only measurement that you have on this exhibit, on the bottom, which would correspond to the top of the exhibit, the top representation, would be the horizontal measurement, isn't that true?

A. No, the dimensions contained on the lower.

Q. Your figures are correct but the representation is ten times exaggerated? Now, in regard to your exhibit number "B", now you have testified, I think, as follows: Question. Now, would you describe to the court what the lower drawing is on Defendant's Exhibit B? Answer: It might be referred to "An elevation", it is the view one might get by standing on the north-south runway and looking south along the center line of the runway.

[fol. 942] You made that answer did you not?

A. Yes.

Q. As a matter of fact this drawing is five times exaggerated on the bottom?

A. No.

Q. Look at the scale.

A. One inch to twenty.

Q. Now, with regard to the measurements on top—the lower part of this exhibit is five times exaggerated, is it not?

A. No, I should say not.

Q. You mean to tell me now this is what you would see if you were standing on the end of the runway looking south?

A. Yes.

Q. What is the scale to the lower part of your illustration?

A. One inch equals twenty feet.

Q. You did the same thing with Exhibit 1, except that is ten to one.

A. Exhibit A is the only one showed an exaggerated scale, sir.

Q. Now, let's get this straight, the top representation in Exhibit "B" is the scale of one to one hundred feet, isn't it?

A. Yes, it is.

Q. Now, then, with respect to the location of these poles down here on the lower part of this illustration which you have drawn, I will ask you again if this isn't exaggerated five times?

A. No.

[fols. 943-949] Q. With respect to the top scale?

A. The lower drawing is a different scale, but no exaggeration.

Q. You don't pretend if one were standing on the end of the runway you should have seen a view of these pole lines at one to one hundred feet, one to twenty feet?

A. No, it was never intended to imply that.

Q. Now, you don't intend to imply that, do you, when I am talking to you, you don't intend to imply that, do you?

A. What?

Q. Just what you said you didn't intend to imply that, do you say you do not now intend to imply when I am talking to you?

A. The scale of the Plan View at the top is five times smaller than the one at the bottom in order to get it on the sheet; there is no exaggeration involved in either drawing.

Q. But with respect to each other there is five times, the lower scale is five times larger than the top one?

A. Yes, it is.

Q. What you are trying to say now is each has to stand by itself, each of these illustrations on Exhibit "B"?

A. Yes, that's right.

* * * * * * *

[fol. 950] SAMUEL P. MOISE called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Purvis:

Q. State your name to the court, please?
A. Samuel P. Moise.
Q. What is your business, your profession, or occupation?
A. Attorney at Law.
Q. Do you practice law in the State of Indiana?
A. I have for forty years, more, or less, past.
Q. What schools, if any, did you attend in preparation for your profession?
A. Got an LLB from Northwestern University.
Q. Are you a member of the bar of any other state, Mr. Moise?
A. Illinois.
Q. Mr. Moise, what, if any, position have you held with the city of Gary, Indiana?
A. President of the Airport Commission for eight years.
Q. During what years were you president of the Board of Aviation Commissioners?
A. I believe from fifty-two to sixty.
Q. That would be January 1st, 1960?
A. That's true.
Q. Mr. Moise, are you familiar with the location of the Gary Municipal Airport?
A. Yes, sir.

* * * * * * *

[fol. 951] Q. If you can, would you describe the boundary of the Gary Municipal Airport?
A. At the east, the approach is to the east, I think the east boundary line is Clark Road; the west is, I think, the E.J. & E. Tracks; to the south is the Calumet ditch to the north is U.S. Highway 12.
Q. If you can, Mr. Moise, if you have personal knowledge, would you describe the area surrounding the airport?

A. It is highly industrial.

Q. Are you familiar with the north approach to the north-south runway of the airport?

A. Yes, sir.

Q. That would be the approach over which the Industrial Highway crosses?

A. U.S. Route 12.

Q. Are any buildings located on the north approach to the area?

[fol. 952] A. Yes, there is the Tanktainer establishment, and there are others, of course, along the highway there.

Q. Would you describe the type of industries within an area of half a mile from the Gary Airport?

Mr. Thorpe: What direction?

Q. In all directions from the Airport?

A. Well, I would say the Mills are approximately, they are to the north; to the west you have your railroad, and you have, I think, Cities Service and I think other gas producing plants; to the south you have the Gary railway and, partially, residences to the east. There are some business places there to the east.

Q. When you refer to "Mills", Mr. Moise, what particular Mills do you refer to?

A. U. S. Steel Corporation.

Q. When you refer to the refinery, what particular refinery do you refer to?

A. Cities Service, I am not so sure within half a mile radius I don't recall that.

Mr. Thorpe: The question is directed to your specific question you are answering.

Q. If you are not sure within a half mile radius, Mr. Moise, could you be as accurate as possible in describing it as a somewhat greater or lesser distance?

A. It could be within a mile. You also have the Northern Indiana Public Service Company to the north.

Q. Now, directing your attention, Mr. Moise, to the south approach to the north-south runway, I will ask you whether [fols. 953-967] or not you know whether there are any structures or obstructions?

A. Yes, sir.

Q. What are those obstructions?

A. Well, you have the Toll Road; you have the Gary City Railway; you have the electric wires, and telephone wires, and you have the telephone poles, and also eight poles erected by Northern Indiana Public Service Company.

Q. Now, I will ask you if you know whether or not there are any obstruction lights on the south approach?

A. Yes, sir. On top of eight poles.

Q. Have you seen the relative height of those poles compared with the height of the Toll Road at that point?

A. I have seen it, yes.

Q. Then I will ask you whether or not the obstruction lights are higher than the Toll Road at that point?

A. They are.

* * * * * * *

[fol. 963] Q. Now, Mr. Moise, are you able to say, from your own personal knowledge, whether or not the obstruction lights located on the south approach to the north-south runway are permanent, or temporary?

* * * * * * *

A. Yes, sir. I answered I said, yes, sir.

Q. Are they permanent, or temporary?

* * * * * * *

[fols. 969-978] A. My opinion is it is intended to be permanent construction.

* * * * * * *

[fol. 979] Q. If you know, Mr. Moise, will you state who requested the erection of the obstruction lights on the south approach to the north-south runway?

* * * * * * *

A. Yes, I know.

Q. Who requested the erection of the obstruction lights on the south approach to the north-south runway?

A. Nick Jankovich suggested it.

Q. Now, those are obstruction lights which are located south of the Toll Road, also south of the South Shore Railroad track, is that correct?

A. Yes, south of the north-south runway.

Q. Now, if you know, Mr. Moise, for the period during which you served as President of the Aviation Board, will you state whether or not there were ever any negotiations with the Chicago South Shore and South Bend Railroad [fol. 980] with respect to lowering the wires, their catenary system, and poles, where that railroad crosses the south approach of the north-south runway?

A. Yes.

Q. Were there ever any negotiations with the South Shore Railroad with respect to lowering those, lowering the catenary system, the poles and wires as they are located south of the south approach?

A. Not during the eight year term of my office.

Q. Were there ever any negotiations, if you know, with the South Shore Railroad with respect to lowering the obstruction lights located south of the South Shore Railroad on the south approach of the north-south runway?

A. No negotiations with the South Shore.

Q. If you know, will you state whether or not during the period you were President of the Aviation Board, were there ever any negotiations with Northern Indiana Public Service Company for lowering any of their poles as they are located on the south approach to the north-south runway?

A. Negotiations to lower, no, sir.

. . . . . .

[fols. 981-986] Q. Mr. Moise, do your knowledge did either Nick or Paul Jankovich, doing business as Calumet Aviation Company, ever request that obstruction lights that are located south of the South Shore Railroad on the south approach to the north-south runway, did either of the Jankovich brothers ever request that those obstruction lights be lowered?

A. No, sir.

. . . . . .

Cross examination.

By Straley Thorpe:

. . . . . .

[fols. 987-988] Q. Now, Mr. Moise, you made the statement to direct examination of counsel, that in your opinion these lights were permanent lights, is that right?

A. Yes, they were placed there to remain permanently.

Q. Just wood poles set up there, aren't they?

A. Yes.

* * * * * * *

[fol. 989] Q. We will suppose now that that runway was extended to the south, toward the obstruction lights, as provided by the master plan, would you regard those obstruction lights then as having been so permanent they couldn't have been cut down, lowered?

[fols. 990-994] A. Poles can be cut at any time, if they so decided. I don't get it, don't understand the question.

Mr. Thorpe: I don't think you do. That is all right.

Q. So, when you said those lights were up as permanent fixtures you didn't mean they were up for all times, sometime they might change, you think they could change the height of the poles?

A. That could happen any time.

Q. So that when you said they were permanent lights you didn't intend for the court to believe they never would be changed?

A. In my opinion, I said, since we paid about eleven thousand to put them in, at the time I made inquiry I was told those poles could stand up there for life, forever, I was advised.

* * * * * * *

[fol. 995] STANLEY M. SHARTLE, a witness heretofore called by the defendant, whose cross-examination was interrupted, pursuant to agreement, to permit Witness Willard Stein, to testify, recalled to testify on Cross Examination.

Cross examination.

By Mr. Thorpe:

Q. Now, Mr. Shartle, again referring to Defendant's Exhibit "B", I think you testified that this diagram repre-

sents what one would see if he were standing on the north-south runway looking south, is that correct?

A. Yes, prior to the construction of the Toll Road.

Q. Now, as a matter of fact, you don't pretend this is an ocular projection of what you would see if you were standing on the north-south runway looking toward the Toll Road?

A. No.

[fol. 996] Q. Now, actually, from a practical standpoint, the best representation of what the person could see would be an untouched photograph, isn't that right?

A. I don't know.

Q. You wouldn't know?

A. No.

Q. Well, you understand what I mean by an ocular projection?

A. Yes.

Q. Isn't a photograph an ocular projection?

A. Yes, it is.

Q. When you look at a photograph you have probably the best mechanical representation of what the eye can see that we know of, isn't that right?

A. I should say so.

Q. So, now, Mr. Shartle, I will now hand you what has been identified as Plaintiff's Exhibit 12, and ask you to look at it, and ask you if that does not appear to be a representation of the Toll Road from the end of the north-south runway, at the south end?

A. Yes, it appears to be.

Q. And that would appear to be a fair representation of what the eye could see, isn't it?

A. No, I can see more with the naked eye than this photograph reveals.

Q. You are sure about that?

A. Positive.

Q. You think something is concealed there?

A. Yes. Not concealed, I should say does not appear.

[fol. 997] Q. Let's get a little closer. I hand you what has been identified as Plaintiff's Exhibit 13, which would appear to be possibly a couple, three hundred feet closer, now, can

you see any more in that photograph than you could in the first one?

A. Yes, I can see greater details of grass.

Q. On the side of the Toll Road?

A. On the side of the Toll Road embankment.

Q. Indicating you are closer to it?

A. Yes.

Q. Now, I hand you what has also been identified as Plaintiff's Exhibit 14, and ask you if that doesn't fairly represent what the eye could see from the position in which the photograph was taken?

A. It's fairly representative, some of the details are not clear.

Q. You wouldn't say that photograph has been retouched.

A. I wouldn't know about that, I am unable to say.

Q. I ask you to look in the distance, down along the runway straight ahead, and ask you if you can locate on this photograph what you have referred to on Defendant's Exhibit "A" as Tanktainer Company building?

A. Yes, I see that.

Q. Where is it?

A. Right here.

Q. All right, indicating the small object at the end of the runway?

A. Yes, beyond the end of the runway.

[fols. 998-999] Q. Beyond the end of the runway, the small white object at the end of the runway?

A. Yes.

Q. That's the Tanktainer, isn't it?

A. Yes.

Q. Now, that in the photograph appears to be in true perspective, wouldn't it?

A. I should think so.

Q. Well, now, Mr. Shartle, again referring to Defendant's Exhibit "A", again referring to the lower drawing exaggerated portion of it, and the purported glide angles superimposed on it, I will ask you whether there is any line thereon which would indicate a glide angle for fifteen feet over the top of the Toll Road?

A. There is not.

Q. Now, would it be possible for you now to impose on this exhibit, by some appropriate designation, a line which would indicate fifteen feet over the top of the Toll Road?

A. It is possible.

Q. You could do that if you had a ruler?

A. It could be done.

Q. Likewise, you could point out a point on this chart which would represent fifty feet over the top of the Toll Road, couldn't you?

A. Yes.

Q. Would you do that?

• • • • • • •

[fol. 1000] A. There, I have marked two points, one fifteen feet above the Toll Road, and one fifty feet above the Toll Road at the north edge of the westbound pavement.

Q. How have you designated them?

A. The one fifteen feet above the pavement I have lettered fifteen feet above; the one fifty feet above the pavement I have designated as fifty feet above the Toll Road.

Q. Now, again referring to Defendant's Exhibit "A", and indicating again the portion with the dotted lines which purport to indicate a glide path or triangulation to the south end of the present runway—that's correct?

A. That's right.

Q. I will ask you if it isn't true that any obstructions which you have indicated there with respect to those triangulated lines, are west of the center line of the north-south runway?

A. Yes, sir, some are.

Q. Are there any that are east of the center line?

A. One is.

Q. Can you tell approximately how far east of the center line it would be?

A. Twenty-four feet.

Q. Now, there are other poles to the east, are there not?

A. Yes, there are.

Q. You didn't designate those on this chart, did you?

A. Not on the profile.

Q. They are somewhat lower, aren't they? Actually?

A. Yes.

[fol. 1001] Q. You just took the ones to the west?

A. Yes.

Q. Now, the highest obstruction I think here is the one farthest west, isn't it?

A. Yes, it is.

Q. Can you now tell us how far west it is of the center line of the runway?

A. Two hundred fifty-two feet west of the runway center line projected.

Q. That is just the top of it, ordinary telephone pole, what is designated as a telephone pole sticks up there, isn't it?

A. No, actually the top of a light that is mounted on the pole.

Q. On the top of the pole?

A. No, the mounting is on the side, and the mounting then projects above the pole.

Q. My recollection of that pole, correct me if I am wrong, the pole which is farthest west, as I recall, had a stub sticking up in the air over the top of anything it carried, am I wrong about that?

A. May I ask you a question?

Mr. Thorpe: Certainly.

Witness: Are you talking about the westernmost obstruction light pole?

Q. The most western obstruction pole.

A. The one which is 252 feet west of the center line of the runway?

[fol. 1002] Q. That might be, I think it is about that far.

A. The light is the highest thing on the whole assembly.

Mr. Thorpe: I think I will have to apologize, I think you are right about that, I think the tallest one to the west of the runway has an obstruction light on it.

Q. And with reference to that particular point, I again hand you Plaintiff's Exhibit 12, and indicate what appears to be a light on the pole ahead of the truck, that would be indicated as being the tallest obstruction there, wouldn't it? These are getting shorter, another one over here.

A. It is so dim I can't see the others in order to compare it.

Q. The one ahead of the truck is the farthest west obstruction light, the others have no light on them, is that right?

A. I am unable to see but one obstruction light for sure owing to the dimness. I am afraid I am unable to answer that.

Q. Well, anyway, it isn't too important. Now again referring you to Exhibit "A", and the lower part on the exhibit, elevations, you have not imposed, or attempted to delineate on this chart any line which would run from the top of the power line, that is to say, the power transmission line for the South Shore Railroad, to the end of the runway, have you, while that would be carried by catenary?

A. No, I have drawn no glide slope from the wires down at that point.

Q. Now, Mr. Shartle, I hand you what has been identified [fol. 1003] as Defendant's Exhibit "C", and ask you again to examine it, and I will ask you now if, with reference to this exhibit, that is the same exhibit which you designated as a chart, is that correct?

A. Yes, it is.

Q. Now, I notice, Mr. Shartle, that you have set up here ten different triangles, right angle triangles, is that correct?

A. Yes.

Q. On the sides of the triangles you have imposed certain measurements, is that correct?

A. Yes.

Q. Now, there is no pretense now on your part that these triangles represent the measurements which are imposed upon the so called chart, is there?

A. Triangles not drawn to scale?

Q. Each of the triangles appear to be about thirty, sixty, ninety degree triangles, aren't they?

A. Yes.

Q. So that all that they indicate on there is simply triangle?

A. That's right.

Q. They in no wise attempt to indicate the proper angles which would be the result of these calculations which you have placed on the chart, would they?

A. No.

Q. Now, as I understand Defendant's Exhibit "C", it rightfully ties into Defendant's Exhibit "A", and is nothing [fol. 1004] more nor less than an arithmetic calculation which you have composed for the court's information.

A. Yes, that's true.

Q. Now, with respect to each of these exhibits, Defendant's Exhibit "A", "B", "C", those exhibits are representative of what you saw this Spring when you were out there making that survey, isn't that true?

A. Yes.

Q. And particularly with respect to what you designate here as the Tanktainer Building, I will ask you if that building is correctly described on the lower part of this chart, that is to say, Defendant's Exhibit "A"?

A. Yes.

Q. That is, but the height of the building is exaggerated ten times, isn't it?

A. The scale is ten times greater.

Q. The net result of it is, with respect to that particular exhibit, the height of the building is exaggerated ten times, isn't it?

A. Yes.

Q. So that to get the relative height, with respect to horizontal measurements, you would have to subtract nine points off of it wouldn't you?

A. Yes, that's right.

* * * * * * *

[fol. 1005] Redirect examination.

By Mr. Houran:

Q. Mr. Shartle, on direct examination I think you testified, referring to Defendant's Exhibit "A", as to what a profile drawing was. Was that definition entirely correct that you testified to on direct examination?

A. I believe not.

Q. Could you correct it at this time? I notice in reference—

Mr. Thorpe: If your honor, please, he did correct it.

The Court: For the purpose of the record, he may answer.

Q. Do you recall the definition you gave for a profile drawing on direct examination?

A. Approximately, yes.

Q. Do you now feel that was a correct definition?

A. I believe it had an extra word that shouldn't be there.

Q. Now, based on your engineering experience, can you give the court what you consider would be a correct definition of Profile Drawing?

A. Yes.

Q. Would you do that, please?

A. I should say that a Profile Drawing is a side view, or elevation at right angles to the object being viewed.

Q. Now, this type of profile would be what you would then call two scale profile, is that correct?

A. It is.

Q. As I recall you testified on direct examination there were two scales on this profile?

A. Yes.

[fol. 1006] Q. Your drawing shows those scales, is that correct?

A. Yes, it does.

Q. What is your horizontal scale?

A. One inch equals one hundred feet.

Q. What is your vertical scale?

A. One inch equals ten feet.

Q. Why did you put two different scales on Defendant's Exhibit "A".

* * * * * * *

A. Owing to the extent of the area surveyed I had only two alternatives as to how the survey might be depicted on a drawing; either I draw the profile in its exact scale, that is, one having the same vertical scale as the horizontal scale, or, I could increase the vertical scale over the horizontal scale in order to better show the details of the

survey; otherwise the drawing would have been immense in size.

Q. Now, assume you made both vertical and horizontal scale one inch equals ten feet, how long would this drawing then have been?

A. It would have been ten times its present size. It is about six feet long, therefore, its length would be sixty feet.

Q. Now, Mr. Shartle, if you had made the vertical scale the same as the horizontal scale, how high would the obstructions at the south end have been?

[fol. 1007] A. Well, if it was drawn to scale, one inch equals one hundred feet, the obstruction lights would be not over three-quarters of an inch to an inch tall; the catenary support poles would be perhaps one-quarter inch to one-half inch tall, and the Northern Indiana Public Service Company power transmission poles would be even shorter than the catenary support poles.

Q. If both vertical and horizontal scales had been one hundred to one, would there be any relative change, as far as proportionate height goes, between NIPSCo high tension line obstruction poles and the catenary support and the Toll Road?

A. They would all be in the same proportion.

Q. I will ask you whether or not the figures you have designated glide angles would in any way be changed?

A. No, those would remain the same.

Q. Now, Mr. Thorpe, pointed out to the court that you only placed two obstruction light poles on this drawing; that is correct, is it not?

A. You are speaking of the Profile, yes.

Q. Why was that done?

A. To place all of the obstruction lights on the drawing would crowd the drawing; perhaps obscure necessary detail.

Q. Why did you choose those particular lights to place on the drawing?

A. Those were the lights which were nearest to the center line of the north-south runway projected.

[fol. 1008] Q. Now, from the light that has the dotted

line, can you tell us where that obstruction pole is in relation to the center line, projected, of the runway?

A. It's eighty-nine feet west of the north-south runway, center line, projected.

Q. The obstruction light pole which appears to be the highest does not have a broken line running from it, isn't that correct?

A. Yes.

Q. Where is that pole located?

A. That pole is two hundred fifty-two feet west of the center line of the north-south runway, projected.

Q. I will ask you whether or not the relative position of all four obstruction light poles are shown any place here on the plan, or profile of Defendant's Exhibit "A"?

A. Yes, they are shown on the plan.

Q. Would you indicate that to the court, please?

A. There is one, two, three, four, obstruction light poles included in the survey.

Q. Now, you are acquainted with what has been identified and offered, and received in evidence as Defendant's Exhibit "C", isn't that correct?

A. Yes.

Q. Ask you whether or not Defendant's Exhibit "C" shows the elevation of all four of the obstruction lights?

A. Yes, it does.

Q. Now, once again, Mr. Shartle, referring to Defendant's Exhibit "A", if both the horizontal and vertical [Tol. 1009] scale were the same, what would be the, what you could probably call the side angle, or edge of the Toll Road; would it appear as steep as it does in this drawing?

• • • • • • • •

A. The slopes under those conditions, drawn under those conditions would be much flatter than appear on this exhibit.

Q. And what would that slope be, if you know?

A. The slope is two to one, or, in angular value, from the horizontal it is twenty-six and one half, approximately.

Q. Mr. Shartle, I hand you what has been identified and offered in evidence as Plaintiff's Exhibit 15, and ask you if any place on this drawing there is any reference to either a vertical or horizontal scale that you can determine?

• • • • • • •

[fol. 1010] Q. Do you have a scale on Plaintiff's Exhibit 15?

A. No, I don't.

Q. I will ask you if you can ascertain what the scale, vertical and horizontal of the profile of this drawing is?

A. Yes, the scale could be determined.

Q. Would you do it please, of the profile?

A. The horizontal scale of the profile is one inch equals two hundred feet, and the vertical scale is one inch equals twenty feet.

Q. So, in respect to these two drawings, referring now to Plaintiff's Exhibit 15 and Defendant's Exhibit "A", the only difference is that Defendant's Exhibit "A" is over all twice the size of Plaintiff's Exhibit 15, isn't that correct?

A. That is right.

[fol. 1011] Recross examination.

By Mr. Thorpe:

Q. Now, Mr. Shartle, again referring to Defendant's Exhibit "A", if I understand your testimony correctly; now that you have testified that the reason for using a dual, two scales, one of the reasons was to keep the drawing on the chart, which you chose for size, isn't that right?

A. Well, it was to show a maximum of detail on as small a sheet as would be feasible.

Q. I think you further said a profile was to demonstrate from a right angle certain measurements which were imposed thereon, I am not giving your exact words but what I understood you to mean?

A. Yes.

Q. Now, then, particularly with respect to your use of the word, right angle, I am exhibiting again to you Plaintiff's Exhibit "A", rather Defendant's Exhibit "A", and I will ask you to indicate where the focal point of this drawing would be, approximately, with respect to this drawing and your projection, where would be the focal point of your measurements?

A. I don't understand what that means, sir.

Q. If you were standing off in the distance, looking at it, approximately at right angle from this drawing, where would you be?

A. At infinity.

Q. By infinity you mean any place from directly in front of it back as far as you could see?

[fol. 1012] A. No, I didn't mean indefinitely, at an infinite distance.

Q. Now then by that you mean that this is a flat projection you don't have a focal point at all, is that what you are trying to say?

A. Yes, that is right.

Q. So that you could stand in front of it at any particular point and the measurements would be approximately correct, having in mind your dual scale?

A. The only point at which it could be properly viewed on the ground would be at a distance of infinity.

Q. Isn't any place you could view this if it were laid on the ground you would get a prospective at all, that's right?

A. That's right.

Q. This is a flat projection and doesn't pretend to be a polyconic projection, anything of the kind?

A. No.

Q. Now, by polyconic, I am speaking of that sort of projection—we are attempting a projection the eye sees, isn't that correct, or approximate?

A. It approximates it, yes.

Q. So, after all the flat drawing does not pretend to illustrate what the eye would see, it is a measurement drawing?

A. Yes, it is.

Q. So we get right back to the same premise I demonstrated a while ago, if you want to approximate what the eye would see you have to have a photograph, or you would [fol. 1013] projected along some other project other than what you have here?

A. Yes.

Q. Now, counsel asked you about Plaintiff's Exhibit 15. Again referring to it, there is no attempt to indicate on this chart, except at the top of it, the position of the obstructions with reference to the end of the north-south runway, is there?

A. No, not so far as dimension is concerned.

* * * * * * *

Redirect examination.

By Mr. Houran:

Q. Mr. Shartle, directing your attention once again back to Plaintiff's Exhibit 15, I will ask you if the obstruction light poles are in any way plotted on this profile?

A. Yes.

Q. How are they plotted?

A. They are plotted by small circles, accompanied by the notation five temporary light poles ELF 538-652. Correction, the notation is, five temporary light poles elb 638-652.

* * * * * * *

Recross examination.

By Mr. Thorpe:

Q. And these poles are shown in proper relative position with respect to the drawing, aren't they?

A. I didn't check from that standpoint.

[fol. 1014] Q. You didn't look at it from that standpoint?

A. Not from their positions.

Q. Keep the question in mind and look at it again, please?

A. Are you speaking of horizontal position?

Q. Yes.

A. Yes, they are drawn approximately correct.

* * * * * * *

Howard B. Wodock called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Houran:

* * * * * * *

Q. What is your business, or occupation?

A. Professional engineer.

* * * * * * *

[fols. 1015-1025] Q. For whom do you work now?

A. Indiana Toll Road Commission.

Q. What position do you hold with the Indiana Toll Road Commission?

A. Technical and administrative assistant to the chief engineer.

Q. How long have you held that position?

A. About three years.

Q. How long did you say you have been with the Toll Road altogether?

A. About six years.

• • • • • • •

[fol. 1026] Cross examination.

By Mr. Thorpe:

• • • • • • •

Q. Now, all of these engineering drawings, ours and [fol. 1027] yours, so far as you can say from an engineering standpoint are approximately correct, aren't they?

A. Yes.

Q. All of them, everybody's work, that is with respect to these engineering drawings?

A. Yes.

• • • • • • •

[fol. 1028] Q. Now, referring to Defendant's Exhibit "B", I will ask you what was the fact, with respect to your observation, visual observation, made—pick out March 7th, 1960—when you were out there, you were standing on the end of the runway, and now, with reference to Defendant's Exhibit "B", I will ask you if you would be able to see any of these wires and obstructions?

A. Yes.

Q. What part of those obstructions would you be able to see?

A. You would be able to see the top of the obstruction lights, and I believe you would probably be able to see the tops of certain catenary support poles.

Q. As a matter of fact all you would be able to see would be just the tops of some of the poles over the top of the Toll Road, wouldn't you?

[fol. 1029] A. If I were standing on the south end of the north-south runway, yes.

Q. You would be unable to see anything, for all practical purposes, below the obstruction lights, isn't that right?

A. No, sir, I don't believe that is entirely correct.

Q. I hand you what has been identified Plaintiff's Exhibit 13; now, you are familiar with the territory there south of the runway, are you not?

A. Yes.

Q. You recognize the objects there in this photograph, do you not?

A. Yes.

Q. And assuming the photograph was made with the camera at eye level of the average height man, I will ask you now, observe the photograph and tell me if you can see any power line in that photograph which you have shown here in the profile, defendant's Exhibit "B".

* * * * * * *

A. No, I cannot see any.

Q. All right, so, obviously, they are concealed there behind the Toll Road bridge, is that right?

A. Possibly.

[fols. 1030-1118] Q. Well, let's see, I will ask you to carefully look at this exhibit again and ask you if all you can see over there isn't the top obstruction lights?

A. I don't know, sir, all obstruction lights, the photograph is not perfectly clear, sir.

Q. Just a minute. Will you answer my question. Read the question to him.

(Question read.)

A. No.

Q. What else do you see then with respect to any wires or power line, or anything, over there?

A. I see what appears to be one, two, three, four, five, six, seven, eight, nine, ten, eleven obstructions of some nature appearing above the Toll Road.

Q. Now, with respect to trucks which are depicted on top of the Toll Road here, what you point out now are approximately the height of the wheels of those trucks, aren't they?

A. From that angle, yes.

Q. We are not talking from any other angle except this photograph, are we?

A. I can only tell you, Mr. Thorpe, what I see, sir.

Q. It is all with reference to this particular photograph which has been identified as Plaintiff's Exhibit 13, isn't that correct?

A. Yes.

* * * * * * *

[fol. 1119] GEORGE CHACHARIS, called as a witness by the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Purvis:

* * * * * * *

Q. Mr. Chacharis, what position, if any, do you hold with the City of Gary, Indiana?

A. I am the Mayor.

Q. When were you elected Mayor of Gary?

A. Last year.

Q. You took office on January 1st, 1959?

A. For this term I took office on January 1st, 1960, but I began serving as Mayor, July 16th, 1958.

Q. Before you began serving as Mayor, in 1958, did you hold any other position with the City of Gary.

[fol. 1120] A. I was City Comptroller for approximately five and a half years prior to becoming Mayor.

Q. When did you first take office as City Comptroller?

A. January 1st, 1953.

Q. When does your present term of office expire?

A. December 31st, 1963.

* * * * * * *

Q. Now, do you recall that there were some negotiations with the Chicago South Shore and South Bend Railroad

regarding obstruction lights south of the South Shore Railroad on the south approaches to the north-south runway of the Gary Airport, do you recall any such negotiations?

A. I do, sir.

Q. I will ask you if you had any part in the negotiations with the South Shore Railroad?

A. I did.

Q. What was your part in those negotiations?

A. Well, as a member of the Board of Public Safety, Public Works and Safety I received some requests from the South Shore Railroad line which I refused to grant until they negotiated with the Airport Commission to [fol. 1121] withstand and defray the expenditures for installing obstruction lights south of the South Shore railroad on the approaches to the north-south runway of the airport.

* * * * * * *

[fol. 1122] Q. What is the position, and location, and height of those poles with respect to the height of the Toll Road at that point?

* * * * * * *

[fol. 1123] A. The position of the poles is in direct line with the north-south runway of the airport, and the lights are higher than the Toll Road, and they are higher than the railroad.

* * * * * * *

[fol. 1124] Q. Now, Mr. Chacharis, I am going to show you what has been identified as Plaintiff's Exhibit 3-A, and ask you if you know what it is?

A. Why this is the lay-out of the Airport.

Q. Would you locate the north-south runway, if you can, on that map? Do you know whether or not there are any structures located immediately north of the north-south runway?

A. Yes, sir.

Q. What are those structures?

A. Tanktainer Corporation is located immediately to the north of the highway and the north-south runway.

Q. That's Industrial Highway?

[fol. 1125] A. Yes, sir. In addition to that this entire area—

* * * * * * *

Q. Do you know any other structures, Mr. Chacharis, within the area of this circle which is drawn on this zoning map?

Mr. Thorpe: What circle are you talking about with reference to the record now?

Mr. Purvis: For the record, I am pointing to the outer boundary of the area which is purported to be zoned by the zoning map.

A. The entire area to the north, to the east and to the west is zoned for industry; there are many industrial structures.

Q. What particular industrial structures of which you have personal knowledge are in that area?

A. We have the Universal Atlas, Portland Cement plants, which has many stacks; there is the NIPSCo Power generating station which has—

Mr. Thorpe: You just tell us what the buildings are; he tells us the building and makes a speech; I object to the speech part of his answers.

The Court: Mr. Witness, confine your answer to the building itself.

[fol. 1126] Mr. Chacharis: Your Honor, I was asked what structures, a stack is a structure, in my opinion. I answered the question along that line.

Q. Continue with the answer if you know of any other structures in that area.

A. I was asked what structures, do you want me to answer that question as to structures?

Q. Yes.

A. There is NIPSCo Generating Station with those two huge stacks—

* * * * * * *

A. There is the E. J. & E. high line east of it, Grasselli plant east of it, Cudahy Plant to the east of it; there is

the South Shore high line to the south of it, and many others.

Mr. Thorpe: Move to have the last part of the answer stricken.

The Court: It may go out.

Q. Now, south of the Airport you have testified, Mr. Chacharis, within the area of the circle, what is the character of that area?

* * * * * * *

[fols. 1127-1130] A. The area to the south of the Airport is comprised of marshes, the Calumet River, also the high line South Shore Railroad.

Q. South of that particular area?

A. Residential area.

Q. So that on one side you testified would be on the south side residential, the other three sides industrial, is that correct?

A. Absolutely correct.

* * * * * * *

[fols. 1131-1132] Q. Mr. Chacharis, during the time that you have been City Comptroller, was there ever any discussion with the South Shore Railroad people, or conversations, or negotiations with you with respect to removing those obstruction poles about which you have testified?

A. The poles that are now there?

Q. Yes.

A. Why, no. The present poles they are there—

* * * * * * *

[fol. 1133] Q. Now, you testified, Mr. Mayor, that the South Shore never entered into any negotiations with you while Mayor or City Controller to remove those poles, did the South Shore Railroad officials, anybody of the South Shore, any of the South Shore Railroad officials, while you were City Controller, ever enter into negotiations with you or discuss with you, following the election, those poles, any South Shore official enter into a discussion with you with respect to shortening the poles?

A. No, sir.

[fols. 1134-1155] Q. Did any South Shore official during the period you have been Mayor, during the time you were Mayor, has any official of the South Shore Railroad entered into any negotiation, discussed with you to shorten the poles?

A. No, sir.

Q. Has anyone while you were City Controller, after the poles were erected, did anyone enter into negotiations or discussion with you for the purpose of shortening those poles?

A. No, sir.

Q. Has anyone during the time you were Mayor of the City of Gary, has anyone entered into any negotiations, or discussions with you for the purpose of shortening the poles?

A. No, sir.

* * * * * * *

[fols. 1156-1157] HUBERT RICHARDSON called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McMahan:

Q. Will you state your name, please?

A. Hubert Richardson.

Q. Where do you live, Mr. Richardson?

A. LaPorte, Indiana.

Q. What is your profession or occupation?

A. Detective Sergeant with the Indiana State Police.

[fol. 1158] Q. How long have you been a member of the Indiana State Police?

A. Sixteen years.

Q. What are your duties as Detective Sergeant with the Indiana State Police?

A. Besides investigating criminal cases, I also do the Photograph work for our district, which is known as District Ten.

* * * * * * *

Q. Are you familiar with the location of the Gary Municipal Airport with reference to its location at the Toll Road?

A. Yes, sir.

Q. I will ask you if you have taken photographs at that location?

A. Yes, sir.

Q. When did you take these photographs?

A. April 26th.

Q. Of this year?

A. Of this year.

Q. I will hand you what has been identified as Defen- [fol. 1159] dant's Exhibit "V", and ask you to look at it. Have you looked at Defendant's Exhibit "V"? Can you tell us what it is?

A. That is a print I made from the negative that I shot with my camera sitting on the north side of the Indiana Toll Road, facing south with it centered with the center line of the north-south landing strip of the airport.

Q. This is a picture that you took, developed and printed on April 26th, 1960?

A. Yes, sir.

Q. And that is a view to the south—

Mr. Thorpe: Just a moment. Let nim tell us what it is or I must object.

A. This is a view looking south, as I said before, with the camera on the north side of the road, facing south: this is the picture that was on the negative when I exposed it, looking south across the Indiana Toll Road and the South Shore Railroad Track.

Q. Did you use a tripod in taking that picture?

A. Yes, sir.

Q. Where was your tripod?

A. Sitting on the berm, extreme north berm of the Indiana Toll Road.

Q. Where was the tripod with reference to the center line of the north-south runway?

A. Centered up with it directly.

Mr. McMahan: Defendant now offers in evidence Defendant's Exhibit "V".

Mr. Thorpe: No objection.

[fols. 1160-1161] The Court: Defendant's Exhibit "V" May be admitted in evidence.

• • • • • • •

[fols. 1162-1163] Q. Now, Mr. Richardson, I will hand you what has been identified as Defendant's Exhibit "W", and ask you to examine it. Have you examined it? Can you tell the court what that exhibit is?

A. That is an 8 x 10 print of another negative that I exposed with the tripod remaining in the same position as it was when I took the picture for Exhibit "V", with the exception I turned the camera to the right, or to the west, and took the picture in that direction. This also shows the Indiana Toll Road and South Shore Railroad and poles and so forth in the background.

Q. This was taken the same day?

A. The same day, a few minutes after the other one was taken without moving the tripod, just angling the camera, just moving the camera on the tripod.

Mr. Thorpe: May I look at the other exhibit just a moment. No objection.

Mr. McMahan: Defendant now offers in evidence Defendant's Exhibit "W".

The Court: Defendant's Exhibit "W" is admitted in evidence.

• • • • • • •

[fols. 1164-1265] Q. Now, Mr. Richardson, I hand you what has been identified as Defendant's Exhibit "X", and ask you to examine the same. Have you examined it. I will ask you to state to the court what it is.

A. That is an 8 x 10 print that I made from the negative I exposed at the same location, a few minutes after the other two were taken, with the exception the camera was angled to my left or in an easterly direction; the tripod remained in the same position for all three shots.

Q. And this shows the Indiana Toll Road.

A. And the South Shore Railroad in the background.

Q. Like the other two exhibits, you exposed the picture, developed and printed this print?

A. Yes, sir.
Q. On the same day?
A. Yes, sir.

Mr. McMahan: Defendant now offers in evidence Defendant's Exhibit "X".

Mr. Thorpe: No objection.

The Court: Defendant's Exhibit "X" is admitted into evidence.

* * * * * * *

[fol. 1266] TURNER CURRAN called as a witness by the Defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Houran:

Q. State your name to the court, please.
A. Turner Curran.

* * * * * * *

[fol. 1267] Q. I will ask you whether or not you were, or are, employed by the Gary Municipal Airport Board, or the Gary Aviation Board?
A. Yes.
Q. In what capacity, sir?
A. For the design of the Gary Municipal Airport.
Q. When did this employment commence, if you can recall?
A. I believe, I might be mistaken, forty-eight or forty-nine.
Q. Are you still engineer for the Gary Municipal Airport?
A. Yes.
Q. Now, you stated something about drawing plans for the airport, did you?
A. It was done under my supervision, yes.
Q. Those would be the lay-out plan, zoning map already in evidence?

A. That is right.

[fol. 1268] Q. I will ask you whether or not you ever designed or drew plans for obstruction lights for the Gary Municipal Airport?

A. Yes.

Q. And, at whose direction was this done, if you can recall?

A. At the direction of the Aviation Commission.

Q. Did you in fact draw such plans?

A. Yes.

Q. And do you recall about when?

A. I believe they were drawn in 1954, I believe.

Q. Now, in compliance with these plans were the obstruction lights installed?

A. Yes.

Q. Do you remember about when they were installed, was that in about fifty-four?

A. No, I believe they were installed the following year.

Q. I will ask you, Mr. Curran, what is the fact as to whether or not these obstruction lights were designed to be permanent installation?

• • • • • • •

[fol. 1269] A. The obstruction lights were designed to cover or to protect the obstruction of the South Shore Railroad; the obstruction lights were intended to be as permanent as the South Shore is, fairly permanent.

• • • • • • •

[fol. 1270] Q. Mr. Curran, based on your employment, and other experience in the field of engineering, do you have an opinion as to what the limiting obstruction of the north-south runway of the Gary Municipal Airport is, specifically regarding the south end of this runway?

• • • • • • •

A. Yes.

Q. What is that obstruction?

• • • • • • •

[fol. 1271] A. At the present time the limiting obstructing would be the obstruction light on the south end of the north-south runway.

Q. I will ask you, Mr. Curran, whether or not this was a limiting obstruction prior to the construction of the Toll Road?

* * * * * * * *

[fols. 1272-1274] A. Yes.

* * * * * * * *

[fols. 1275-1276] Cross examination.

By Mr. Thorpe:

* * * * * * * *

[fol. 1277] Q. Now, any man with spurs on could go up [fol. 1278] that pole, lift the lights off, and with a buck saw, or any other kind of saw, saw it off in three minutes at least, couldn't he?

A. Possibly.

Q. And lower the lights, if necessary?

A. Yes.

Q. Or could go down to the ground, cut it off twenty-three feet from the ground and put lights on top of that, couldn't he?

A. That is right.

Q. How many poles are there there?

A. I have forgotten.

Q. Six, aren't there?

A. I believe, I am not sure.

Q. A half days work, it wouldn't be too much work for two or three fellows to go out there and drop those lights down, if necessary, would it?

A. That would depend on who was doing it.

Q. I guess that is right, but suppose I am a hard worker, so are you, suppose you and I put spurs on, in half a day could we cut the poles down?

A. I wouldn't do it myself.

Q. Anybody skilled climbing up a pole wouldn't have too much trouble lowering the lights?

A. No, they could be lowered, I don't want to say how much time it would take.

Q. Well, now, obstruction lights, do you understand the purpose of obstruction lights at a runway?

[fol. 1279] A. I believe I do.

Q. What is your understanding of the purpose of obstruction lights?

A. I would say an obstruction light is to warn a plane that there is an obstruction in that vicinity, and in this particular instance it is in the glide path of the runway, so the obstruction light is placed to warn incoming pilots, or those going out, that the South Shore is an obstruction, stay above it.

Q. There is some obstruction there?

A. That is right.

Q. Wouldn't necessarily mean a temporary or permanent form of obstruction, should not fly in.

A. That is right.

Q. That is the purpose of the obstruction light?

A. That is right.

Q. When the obstruction is no longer there there is no reason for the light?

A. None whatever.

Q. Now, that Toll Road embankment is a pretty solid affair isn't it?

• • • • • • •

[fol. 1280] A. I would say yes.

Q. It isn't readily removable is it, I mean, you just wouldn't remove it in two or three days, would you?

A. There again it depends on the type of equipment and men you get in there.

Q. Anyway, this Toll Road is a grade which is a solid embankment, isn't it?

A. Yes.

Q. Do you now know whether the Toll Road, and the poles on top of it, are higher than the South Shore, or not?

A. From my own knowledge, as far as actually going out to survey, they do not; some plans I have seen, yes, in some spots the Toll Road, this is only from plans I have seen, it is not from my own engineering investigation.

Q. You haven't been down on the runway and looked at the obstruction lately, have you?

A. Not recently, no.

Q. Have you ever been down there?

A. Yes.

Q. Have you observed whether the Toll Road at the end of the runway, and poles, and traffic, on top of it, is higher than the South Shore and the appurtenances to the South Shore?

A. It appears the road bed, this is again appearance, that the road bed in some spots is higher than the road bed of the South Shore.

Q. Mr. Curran, upon that subject I hand you what has been identified as Plaintiff's Exhibits 12, 13 and 14, hand [fol. 1281] them to you in that order and ask you to examine each of them. Now, you have examined these exhibits, sir?

A. Yes.

Q. I will ask you if those would appear to be fairly correct, true representations of the scene which they depict?

A. Yes, from the spot in which they were taken, yes.

Q. Would these exhibits refresh your recollection now as to whether the Toll Road grade would be higher than the South Shore Railroad and its appurtenances?

A. Not entirely, no; I believe in some places it is lower, some places higher. I do not know from my own engineering investigation.

* * * * * * *

[fol. 1282] Mr. Houran: The defendant will now offer into evidence that which has been marked Defendant's Exhibit QQ, which is a certified copy of a record called "Airport Facilities Record", which is a record of the Aeronautics Commission of the State of Indiana, certified to as such. This record is dated January 30th, 1953, and we are offering it for the purposes of showing the listed obstructions and glide angles to the north-south runway prior to the construction of the Toll Road, and also to show that the northwest, southeast runway is expandable one thousand feet.

* * * * * * *

[fols. 1283-1285] The Court: It might be considered a public record. I will admit it in evidence only as a part of the overall picture to give it such weight as might be deserved on the overall picture. Defendant's Exhibit QQ may be admitted in evidence.

• • • • • • •

[fols. 1286-1287] Mr. Houran: The defendant now offers into evidence what has been marked, for purposes of identification, Defendant's Exhibit RR, which is a certified copy of an Airport Facilities Record on file in the office of the Aeronautics Commission of Indiana, which said record is dated June 21st, 1957, and is offered into evidence for the purpose of showing the glide angles on file in the office of the Commission, and what obstructions are at the ends of the north-south runway after construction of the Toll Road.

• • • • • • •

The Court: I am going to let it go in for the same purposes as I stated before.

• • • • • • •

[fol. 1288] Robert Laughery called as a witness by the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Houran:

Q. Would you state your name to the court, please?
A. Robert Laughery.
Q. Where do you live?
A. Valparaiso.
Q. Married?
A. Yes, sir.
Q. Do you live in Valparaiso with your family?
A. I do.
Q. What is your business, or occupation?
A. Surveying and airport manager.

Q. What airport do you manage?
A. Porter County Municipal.

. . . . . .

[fol. 1289] Q. Did you subsequently graduate from Purdue?
A. Yes.
Q. What year did you graduate?
A. 1947.
Q. What did you graduate in?
A. School of Air Transportation, Airport Manager Division..

. . . . . .

[fols. 1290-1291] Q. What branch of the service did you go in?
A. U. S. Army Air Corps at the time.
Q. That is what is now known as United States Air Force?
A. That is correct.
Q. All right, what year did you go to cadet school?
A. 1943.
Q. Did you subsequently graduate from Cadet School?
A. Yes.
Q. What type planes did you fly during the course of your cadet training?
A. Standard primary trainers, basic trainers, PY19, BT13 UC78 twin engine, graduated in B25.

. . . . . .

[fol. 1292] Q. How many hours have you had in aircraft over fifteen thousand pounds?
A. Over fifteen thousand, I would say it is in the neighborhood of twenty-three hundred to twenty-five hundred hours.
Q. Those hours you received since you went in the Air Corps up to the present time?
A. That is correct.
Q. You are still actively engaged in flying in the Air Force Reserve?
A. I am.

Q. When was the last time you flew for them?

A. The last time, last Thursday and Friday.

Q. Where did you fly at that time?

A. C119 box car.

Q. Bob, I will ask you what type planes you put your twenty-three hundred hours in?

A. As I stated before, some in B25, A26, Douglas A26, C47, C46's, C119, I am not sure if the Twin Beech gross is over fifteen thousand pounds or not.

Q. What type civilian license do you hold?

A. Commercial pilot rating, with instrument rating attached to it.

Q. You also have hours in light planes?

A. Quite a few.

Q. Have any idea how many?

A. Around two thousand I believe.

* * * * * * *

[fols. 1293-1299]. Q. I will ask you, Mr. Laughrey, if you are familiar with the Gary Municipal Airport?

A. In what way?

Q. Have you ever flown in and out of it?

A. Yes, I have ever flown in and out of it in a plane that grossed more than fifteen thousand pounds?

A. I have flown out of it.

Q. In what kind of a plane?

A. C46.

Q. I will ask you if you have ever flown in and out of that airport in a light plane?

A. Yes, I have.

Q. When was the most recent time?

A. Approximately three weeks ago, three or four.

Q. You are then familiar with the Gary Municipal Airport, the obstruction to the runway.

A. To the runway used at that time.

* * * * * * *

[fol. 1300] Q. Once again, Bob, with your experience as a pilot, familiar with the Gary Municipal Airport, referring particularly to the south runway, the obstruction at the end of the south runway, what do you feel is the limiting obstruction to the south end of the north-south runway?

* * * * * * *

A. Well, during take-off roll, or landing, you always try to clear the highest obstruction in the direct path of the aircraft, and, in this case here, the most noticeable thing at the south end of the runway during take-off is the obstruction lights.

Q. Your answer to that would be the obstruction lights are the limting factors on the north-south runway?

[fol. 1301] A. That is correct.

Q. Now, Mr. Laughrey, assume the obstruction lights were down, do you have an opinion what would be the limiting obstruction to the north-south runway?

A. If I remember correctly, high tension wires, there are quite a few, catenary system wires over the South Shore out there, they were visible.

Q. You think that would be the next limiting factor to the north-south runway, is that right?

A. Yes, sir, it would.

Q. Do you know the approximate number of wires down there at the south end of the runway?

A. Quite a number of them.

Q. Do you have an idea of the approximate number of them? I think the evidence has been about thirty-four.

A. Thirty or forty, somewhere in there I judge.

Q. The evidence also has been part of those wires make up a high tension line comprising a total of around forty thousand volts.

* * * * * * *

Q. Assume further at the end of the runway, Mr. Laughrey there are double catenary systems, consisting of about eight wires, you are familiar with that catenary system are you not?

[fols. 1302-1332] A. To the extent I have seen it from the ground, yes.

Q. I will ask you, based on your experience, if you feel you could safely penetrate that cluster, group of wires in an aircraft such as a DC-3?

A. Safely penetrate it, no.

* * * * * * *

[fols. 1333-1339] HAROLD ZWEIG called as a witness by the defendant, having been previously sworn, testified as follows:

* * * * * * *

[fols. 1340-1343] Cross examination.

By Mr. Thorpe:

* * * * * * *

[fol. 1344] Q. You know finally, in August, an agreement between the City of Gary and the Toll Road with respect to the location of the Toll Road was reached, and the City [fol. 1345] was paid a large sum of money, you recall that, don't you?

A. Yes, sir.

Q. Now, I will ask you if you don't also recall the only thing mentioned in that agreement was matters pertaining to the east-west runway?

A. As I recall, all of the discussions were with respect to the east-west runway, and that this was incorporated in the agreement.

Q. Well, as a matter of fact that was the chief concern of both of these meetings, what was going to happen with the east end of the east-west runway?

A. Yes, sir.

* * * * * * *

[fol. 1346] Redirect examination.

By Mr. Houran:

Q. Mr. Zweig, did I understand you to say on cross examination the chief concern was the east-west runway?

* * * * * * *

A. Yes, sir.

Q. Why was that?

* * * * * * *

[fols. 1347-1372] A. We were primarily concerned with the east end of the east-west runway because the location

of the Toll Road as originally planned formed an obstruction, an additional obstruction to the Airport which we did not have previously. Now, the reason our discussion centered around the east-west, not north-south, is that the north-south runway already had obstructions over which the Toll Road did not offer any additional obstruction and that in all our discussions we knew that the obstruction on the north-south runway, existing obstructions were greater than what the Toll Road would provide.

* * * * * * *

[fol. 1373] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1374] IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 1

/s/ ROBERT W. DAVIS
48-1410

/s/ OSCAR L. CONWAY

/s/ HAROLD STACK

ORDINANCE NO. 2376

AN ORDINANCE CONCERNING THE ACQUISITION, IMPROVEMENT, OPERATION AND MAINTENANCE OF AN AIRPORT FOR THE CITY OF GARY, LAKE COUNTY, INDIANA

BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF GARY, LAKE COUNTY, INDIANA, as follows, to-wit:

SECTION ONE: That a necessity is hereby declared to exist for the acquisition, improvement, operation, and/or maintenance of an airport for the City of Gary, Lake County, Indiana, favors the acquisition, improvement, operation, and/or maintenance of an airport for such City under the provisions of Chapter 57 of the Acts of Indiana General Assembly, 1929 and all acts amendatory thereof and supplemental thereto.

SECTION THREE: That the City of Gary, Lake County, Indiana, hereby adopts the provisions of Chapter 57 of the Acts of Indiana General Assembly 1929 and all acts amendatory thereof and supplemental thereto, and that the City of Gary, Lake County, Indiana, shall acquire, improve and/or maintain an airport for said City of Gary, and a "Department of Aviation" of the City of Gary shall be established under and pursuant to the provisions of said Chapter 57 of the Acts of Indiana General Assembly 1929 and all acts amendatory thereof and supplemental thereto.

SECTION FOUR: This ordinance shall be in full force and effect from and after its passage by the Common Council and approval by the Mayor.

PASSED by the Common Council of the City of Gary, Lake County, Indiana, on this 16th day of October, 1939.

[fol. 1375]

/s/ M. J. HARTNETT
Presiding Officer

Attest: /s/ ANTHONY E. DOBIS, JR.
City Clerk

Presented by me to the Mayor for his signature and approval this 25th day of October, 1939.

/s/ ANTHONY E. DOBIS, JR.
City Clerk

Approved and signed by me this 25th day of October, 1939.

/s/ ERNST SCHAIBLE
Mayor of the City of Gary,
Lake County, Indiana

ORDINANCE INTRODUCED.
October 2, 1939

ORDINANCE SECOND READING.
October 2, 1939

FINAL PASSAGE OF ORDINANCE
October 16, 1939

[fol. 1376]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT No. 2

[Handwritten notation—City of Gary—Legal Dept.—City Hall, Gary]

City of Gary
Legal eDpt.
City Hal., Gary

QUITCLAIM DEED

[Stamp—283596]

THIS INDENTURE WITNESSETH: That the RECONSTRUCTION FINANCE CORPORATION, a corporation duly organized and existing under and by virtue of the laws of the United States, which corporation has succeeded pursuant to the provisions of Public Law 109, 79th Congress, approved on June 30, 1945, to all the rights and assets of Defense Plant Corporation, acting by and through the War Assets Administrator, under and pursuant to Executive Order 9689, dated January 31, 1946, and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765); and the powers and authorities contained in the provisions of the Federal Airport Act of 1946 (60 Stat. 170), and War Assets Administration Regulation No. 1, as amended, hereby quitclaims to the City of Gary, County of Lake and State of Indiana, and to its successors in function forever, hereinafter called the GRANTEE, for and in consideration of the development and operation of the herein demised premises as a public airport in perpetuity from the date hereof and for the benefit which shall accrue to the United States of America from the continued use of such property as an airport, the following described property situate in the County of Lake and State of Indiana, to-wit:

> Those lands incorporated in Reconstruction Finance Corporation project known as Tracts A and C of Plancor 1035, Rubber Synthetics, Gary, Indiana, (WAA No. R-Ind. 6), legally described as follows:

That part of the East One Half (E½) of Section Thirty-five (35), Township Thirty-seven (37), Range Nine (9) West, of the Second Principal Meridian, lying between the C.L.S. & E. Railroad and the Grand Calumet River, and that part of the West One Half (W½) of Section Thirty-six (36), Township Thirty-seven (37), Range Nine (9) West, lying between the U.S. Highway No. 12 and the Grand Calumet River, and that part of the Southeast Quarter (SE¼) of Section Thirty-six (36), Township Thirty-seven (37), Range Nine (9) West, lying between U.S. Highway No. 12 and the Grand Calumet River, and that part of the Southeast Quarter (SE¼) of Section Twenty-six (26), Township Thirty-seven (37), Range Nine (9) West, lying between the C.L.S. & E. Railroad and U.S. Highway No. 12, all in the City of Gary, Lake County, Indiana. Tract A is composed of 476.885 acres, and Tract C is composed of 133.971 acres. Total area is approximately 610 acres.

with all its appurtenances, being a part of the same property acquired by the Defense Plant Corporation under that certain Warranty Deed executed by the Gary Land Company, an Indiana corporation, dated August 25, 1942, and filed for record in the Recorder's Office of Lake County, Indiana, on October 9, 1942,

[Stamp—Key No. 40-175-1—NOT Taxable—Jun 7, 1947—/s/ STANLEY E. CLAZEWSKI—Auditor Lake County]

[Stamp—State of Indiana S.S. No.
—Lake County—Filed for Record—1947 Jun 2 PM 1 48—Paul P. Kozacik, Recorder]

Book 782 Page 309

[fol. 1377] as Document No. 74127, in Book No. 666, Page 278, and that certain Warranty Deed executed by the Elgin, Joliet and Eastern Railroad Company, an Illinois and Indiana corporation, dated December 22, 1942, and filed for record in the Recorder's Office of Lake County, Indiana, on December 23, 1942, as Document No. 82584, in Book 670, Page 68.

PROVIDED, that the title to the said premises shall automatically revert to the United States if and in the event that the Administrator of Civil Aeronautics or his successor in function determines that the premises have not been developed for airport purposes within a reasonable period of time after the date hereof, or that after having been so developed the premises have ceased to be used or are necessary for airport purposes.

Said land was duly declared surplus and assigned to the War Assets Administration for disposal acting pursuant to Executive Order 9689 and War Assets Regulation No. 1, as amended.

AND, the Grantee for and in consideration of the property conveyed hereby does for itself and its successors in function, covenant and agree as follows:

FIRST: That the Grantee will develop an airport upon the lands herein demised

SECOND: That such airport will be operated as a public airport on fair and reasonable terms and without unjust discrimination;

THIRD: That any subsequent transfer of the property interest conveyed hereby will be made subject to all of the covenants, conditions and limitations contained in this instrument.

FOURTH: That in the event of breach of any condition or covenant herein imposed, then the Administrator of Civil Aeronautics of the U.S.

Department of Commerce, or his successor in function, may immediately enter and possess himself of title to the herein demised premises for and on behalf of the United States of America;

FIFTH: That in the event of breach of any condition or covenant herein imposed, the Grantee will, upon demand by the Administrator of Civil Aeronautics of the U.S. Department of Commerce, take such action, including the prose- [fol. 1378] cution of suit, or execute such instruments, as may be necessary and required to evidence transfer of title to the herein demised premises to the United States of America.

IN WITNESS WHEREOF, the UNITED STATES OF AMERICA has caused these presents to be executed in its name by the War Assets Administrator this 29th day of May, 1947.

RECONSTRUCTION FINANCE CORPORATION
By and through the
WAR ASSETS ADMINISTRATOR

By /s/ JOSEPH A. BURKE
Joseph A. Burke
Zone Director, Zone III
Office of Real Property Disposal
War Assets Administration
Chicago, Illinois

Witnesses:

/s/ JOHN J. LAWLESS
John J. Lawless

/s/ SAMUEL S. DUBIN
Samuel S. Dubin

[fol. 1379]

STATE OF INDIANA,
COUNTY OF LAKE, SS.:

This is to certify that I, RAY BUTZ, recorder of Lake County, Indiana, am the custodian of the records of this office, and that the foregoing is a full, true and complete copy of a QUIT CLAIM DEED as recorded in DEED Record 782 Page 309 to 311 Inc. with the certificate of Paul P. Kozacik Recorder, at the time of filing of said instrument.

Dated this 19th day of March 1960.

/s/ RAY BUTZ
RAY BUTZ, Recorder Lake County, Ind.

(Seal)

[fol. 1380]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 3

Ordinance No. 2897

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES, AND OTHERWISE REGULATING THE USE OF PROPERTY IN THE VICINITY OF THE GARY MUNICIPAL AIRPORT BY CREATING AIRPORT APPROACH AND TURNING ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; DEFINING CERTAIN TERMS USED THEREIN; PROVIDING FOR APPEALS THEREFROM; AND IMPOSING PENALTIES FOR VIOLATION THEREOF.

WHEREAS, airport hazards endanger the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has, through the power granted it under the Airport Act of 1945 and amendments thereto, adopted certain standards for the safe descend, landing and ascend of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land, and

WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has by Resolution recommended the adoption of this ordinance,

NOW, THEREFORE, PURSUANT to the powers granted by virtue of Section 9, Chapter 360, of the Acts of 1945; Chapter 174 of the Acts of 1947; and Chapter 109 of [fol. 1381] the Acts of 1949, as well as its general police powers, BE IT ORDAINED by the Common Council of the City of Gary, Lake County, Indiana, as follows:

Section 1: SHORT TITLE—This ordinance shall be known and may be cited as the "Airport Zoning Ordinance of the City of Gary".

Section 2: DEFINITIONS—As used in this Ordinance, unless the context otherwise requires:

(a) "Airport" means the Gary Municipal Airport encompassing the area bounded by the Calumet River on the south, the E. J. & E. Railroad right of way on the west, and by the U. S. Highway No. 12 on the north and east.

(b) "Airport hazard" means any structure or use of land which obstructs the air space required for the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such landing or taking off of aircraft.

(c) "Non-conforming use" means any structure or use of land which does not conform to a regulation prescribed

in this ordinance or any amendment thereto as of the effective date of such regulations.

(d) "Person" means any individual, firm, co-partnership, corporation, company, association, joint stock association or body politic and includes any trustee, receiver, assignee or other similar representative thereof.

(e) "Structure" means any object constructed or installed by man, including but without limitation buildings, towers, smoke stacks, and overhead transmission lines.

(f) "Landing area" means the area of the Airport used for the decend, landing, taking off or taxiing of aircraft.

Section 3. Zones—In order to carry out the purposes of this ordinance, all the land within the boundaries of the Gary Municipal Airport and within two miles of the end of any proposed runway is hereby divided into:

[fol. 1382] (a) Turning Zones

(b) Outer Area Approach Zones

(c) Inner Area Approach Zones

(d) Transition Zones

the boundaries of which are shown on the Gary Airport Zoning Map dated April 12, 1949, and which is made a part hereof and incorporated herein by reference, two copies of which Map are on file in the office of the City Clerk and in the Office of the City Engineer, said Map shall be available for examination at all times that said respective Offices shall be open for business. There is hereby incorporated herein by reference and made a part hereof a Lay-Out Plan or Map, dated April 12, 1949, to be used in connection with the Gary Airport Zoning Map, two copies of which said Lay-Out Plan are on file in both the offices of the City Clerk and City Engineer, and which said Maps shall likewise be available for examination.

Section 4: Height Limits—Except as otherwise provided in this ordinance, no structure shall be erected, altered, or maintained, in any airport approach zone or airport turning zone to a height in excess of the height limit

herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

(a) Turning Zone, 150 feet

(b) Outer Area Approach Zone, 150 feet

(c) Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope

(d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet

[fol. 1383] All height limits shall begin at elevation of 590 feet above sea level.

Section 5: Non-Conforming Use—The regulations prescribed in Section 4, of this Ordinance, shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date hereof, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted and completed within two years thereof.

Section 6: Variances—Any person desiring to erect any structure or increase the height of any structure or use his property not in accordance with the regulations prescribed in this Ordinance, may apply for a variance therefrom. Such variance shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance. All variances hereunder shall be granted by the Board of Zoning Appeals of the City of Gary as hereinafter constituted and all requests therefor shall be in accordance and under the rules and regulations of the

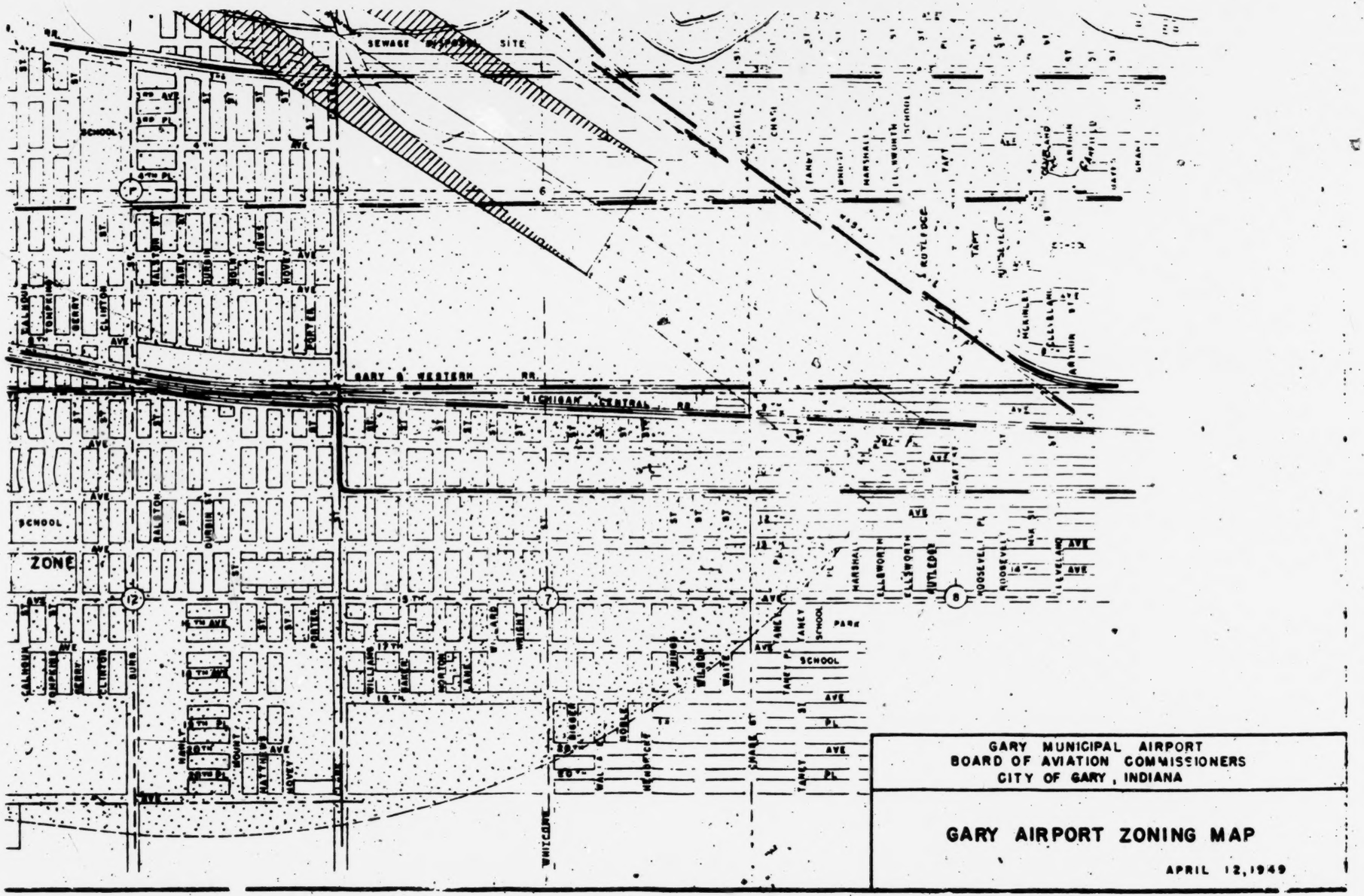
Board of Zoning Appeals of the City of Gary, and all laws now in effect in respect thereto.

Section 7: APPEALS—(a) The Board of Zoning Appeals of the City of Gary shall be and is hereby constituted the proper Board to which all appeals from decisions rendered in the enforcement of this ordinance or any other zoning ordinance shall be taken. All such appeals from the decision or ruling of any board, agency or department of the City of Gary in respect to such zoning ordinances shall follow the rules of the said Board of Zoning Appeals, and [fol. 1384] all statutes of the State of Indiana in such case made and provided.

(b) Whenever notice of any such appeal shall be served upon any such board, agency or department of the City of Gary, it shall be the duty of the secretary, chairman or department head of any such board, agency or department to immediately notify in writing the Secretary of the Board of Aviation Commissioners of such appeal. The said Board of Aviation Commissioners shall have the power to intervene in such proceedings and be heard insofar as such ruling or decision may affect the operation of said Municipal Airport.

(c) No department, board or agency of the City shall have the power to grant variances hereunder except such Board of Zoning Appeals, and nothing contained herein shall prevent the Board of Aviation Commissioners from appealing such decision or ruling to the Board of Zoning Appeals, or prevent said Board of Aviation Commissioners from appealing any decision, grant or ruling of said Board of Zoning Appeals to a proper court as now provided by law.

(d) Whenever any petition or application shall be filed with the Board of Zoning Appeals for any variance under this ordinance or any other zoning ordinance affecting said Airport, the said Board of Zoning Appeals shall immediately notify the Secretary of the Board of Aviation Commissioners of such application or petition and the said Board of Aviation Commissioners shall be granted an opportunity to be heard in respect thereto.


SEWAGE DISPOSAL SITE
GARY & WESTERN RR.
MICHIGAN CENTRAL RR.
SCHOOL
ZONE
PARK
GARY MUNICIPAL AIRPORT
BOARD OF AVIATION COMMISSIONERS
CITY OF GARY, INDIANA
GARY AIRPORT ZONING MAP
APRIL 12, 1949

(e) An appeal from the decision of any such Board, agency or department of the City of Gary to the Board of Zoning Appeals shall stay all proceedings of the action appealed from unless the aggrieved person or the Board of Aviation Commissioners certifies to the Board of Zoning Appeals after notice of appeal has been filed with it, that by reason of the facts stated in the certificate, a stay would [fol: 1385] in his or its opinion cause unusual peril to life or property. In such case, proceedings shall not be stayed otherwise than by order of the Board of Zoning Appeals on notice to the Board of Aviation Commissioners on due cause shown.

(f) The Board of Zoning Appeals shall have the same power as is now granted unto it by law in relation to other zoning matters.

Section 8: Whenever and wherever enforcement of this ordinance necessarily involves property or real estate situated within the boundaries of another municipality, the Board of Zoning Appeals is hereby granted authority to act, if in conformance with the ordinances, rules, or regulations of such adjoining municipality, or may act jointly with a Board of Zoning Appeals of any other municipality, if such provisions shall be made by such municipality, it being the intention hereof to permit said Board of Zoning Appeals to cooperate and coordinate in its efforts with any other agency or board of any adjoining municipality towards enforcement in fact and in spirit of the purposes and intent of this ordinance.

Section 9: The construction, erection or maintenance of any airport hazard in violation of this ordinance is hereby declared to be a public nuisance.

Section 10: PENALTIES—Each violation of this Ordinance or any regulation, order, or ruling promulgated hereunder, shall be punishable by a fine or not more than $300.00 and each day a violation continues shall be a separate offense.

Section 11: CONFLICTING REGULATIONS—Where this ordinance imposes a greater or more stringent restriction

upon the use of land than is imposed or required by any other ordinance or regulation, the provisions of this Ordinance shall govern.

Section 12: SEVERABILITY—If any of the provisions of the ordinance or the application thereof to any person or [fol. 1386] circumstances held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 13: This ordinance shall be in full force and effect from and after its passage.

Passed by the Common Council of the City of Gary, Lake County, Indiana, this 19th day of Sept., 1949.

HOBART D. WIGGERLY
Presiding Officer

ATTEST: NICK P. ELICH
City Clerk

Presented by me to the Mayor for his approval and signature, this 20th day of Sept., 1949.

NICK P. ELICH
City Clerk

Approved and signed by me this 20th day of Sept., 1949.

EUGENE H. SWARTZ
Mayor, City of Gary, Indiana

[fol. 1387]

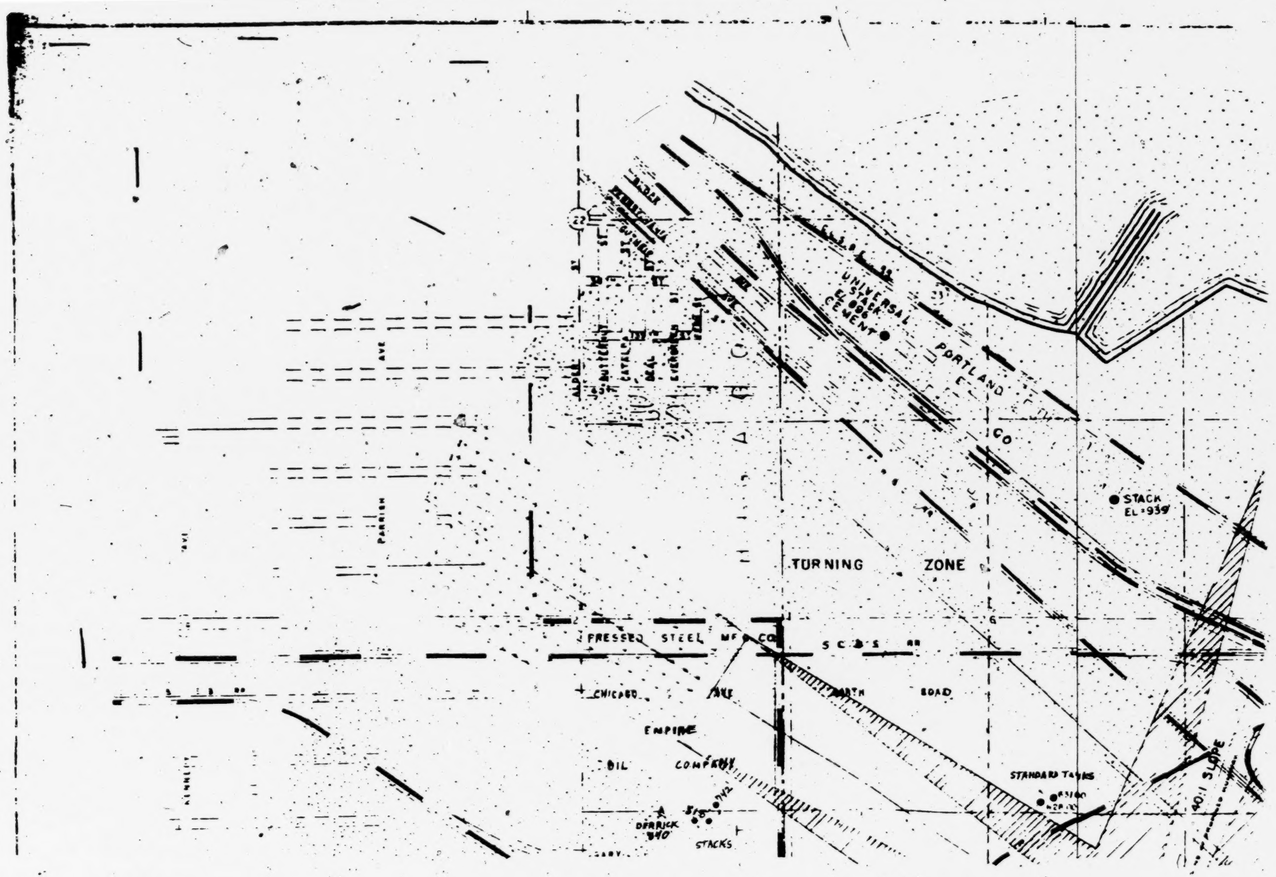
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

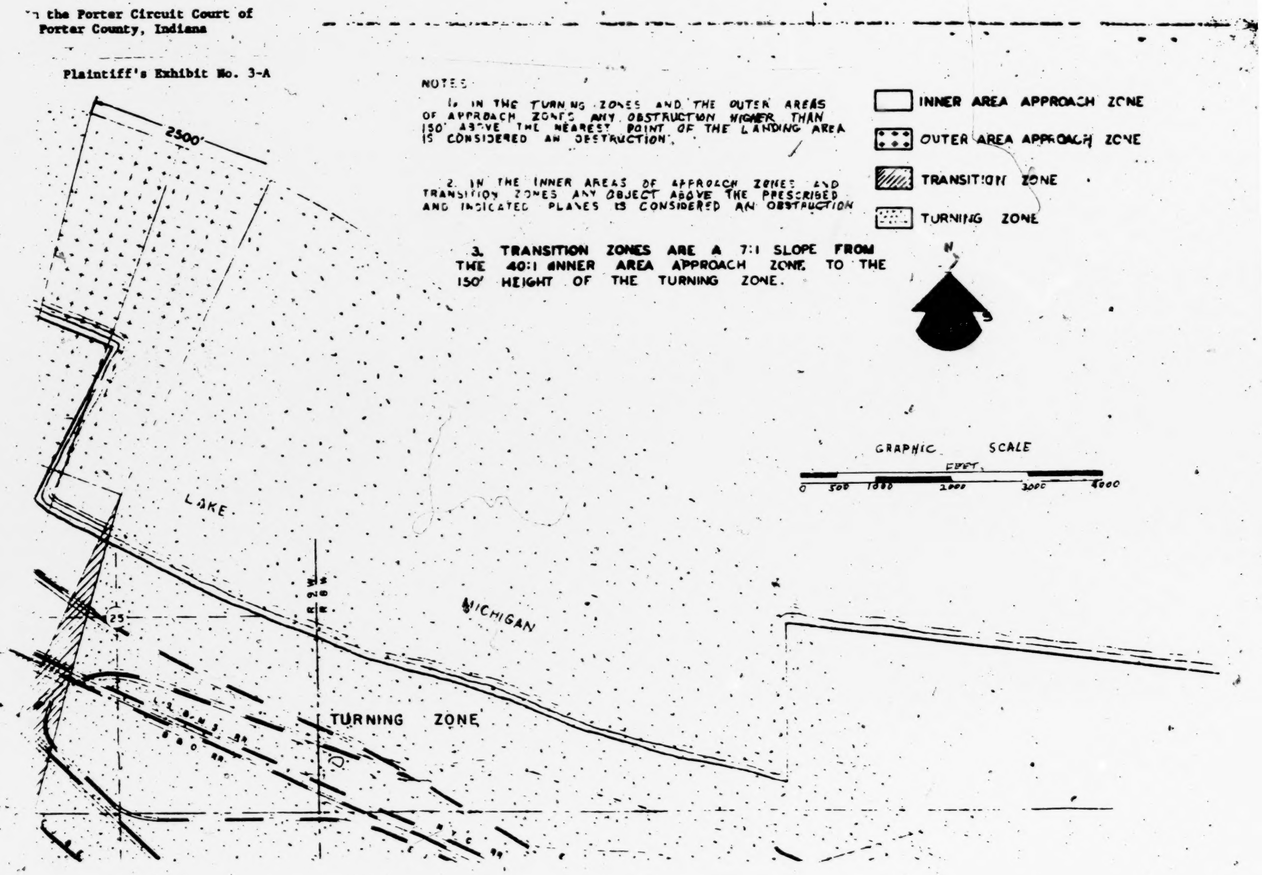
PLAINTIFFS' EXHIBIT No. 3A

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

Plaintiff's Exhibit No. 3-A





NOTES:

1. IN THE TURNING ZONES AND THE OUTER AREAS OF APPROACH ZONES ANY OBSTRUCTION HIGHER THAN 150' ABOVE THE NEAREST POINT OF THE LANDING AREA IS CONSIDERED AN OBSTRUCTION.

2. IN THE INNER AREAS OF APPROACH ZONES AND TRANSITION ZONES ANY OBJECT ABOVE THE PRESCRIBED AND INDICATED PLANES IS CONSIDERED AN OBSTRUCTION.

3. TRANSITION ZONES ARE A 7:1 SLOPE FROM THE 40:1 INNER AREA APPROACH ZONE TO THE 150' HEIGHT OF THE TURNING ZONE.

INNER AREA APPROACH ZONE

OUTER AREA APPROACH ZONE

TRANSITION ZONE

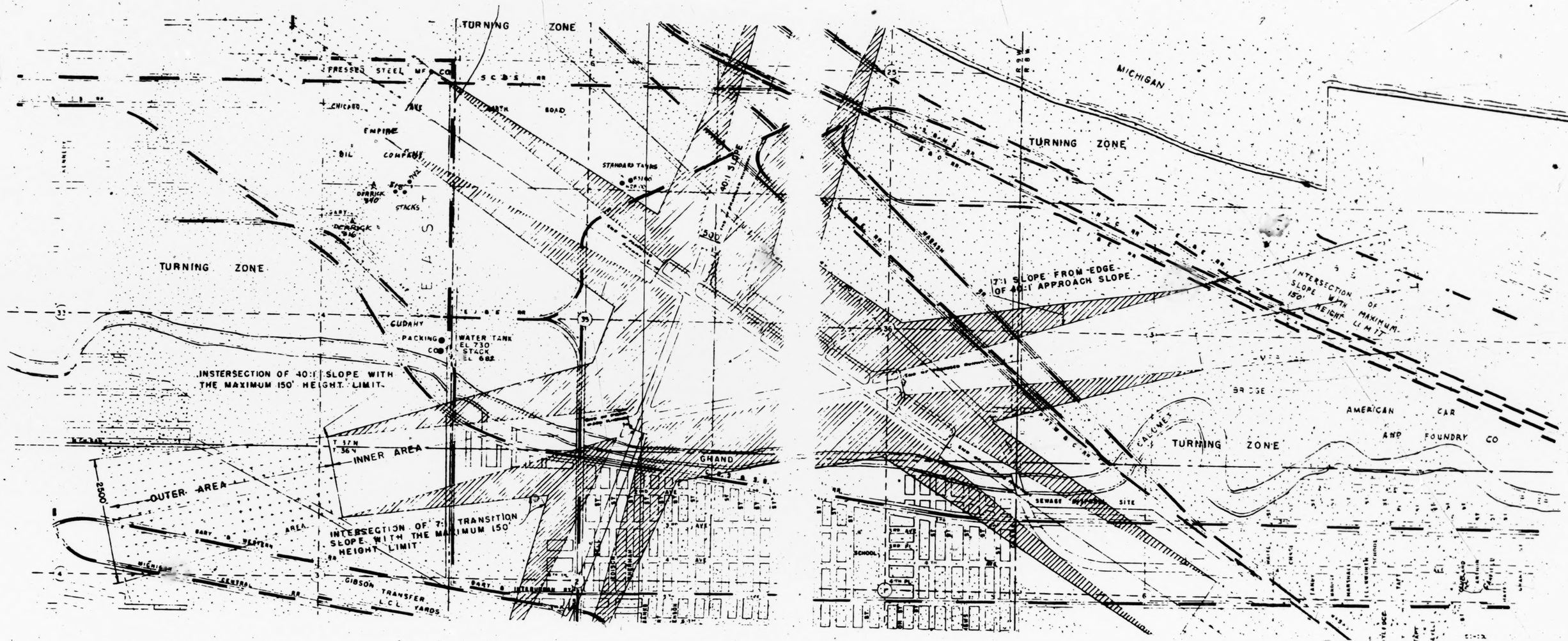
TURNING ZONE

N

GRAPHIC SCALE

FEET

0 500 1000 2000 3000 4000



In the Porter Circuit Court of
Porter County, Indiana

Plaintiff's Exhibit No. 3-B

133 971 ACRES

INDUSTRIAL HIGHWAY U.S. NO 12

BM 82

-1+50

NW-SE RW

R 1071 28'

S 89°-59'-52" E 250

N 0°-0'-08" E 1236 18'

N 88°-54'-17" W 22 935'

S 88°-54'-17" E 1294 195'

1455'

2622 18'

3863'

BM 83

BM 84

BM 85

BM 86

N-S RUNWAY 150' x 3900'

N 2°-41'-30" E

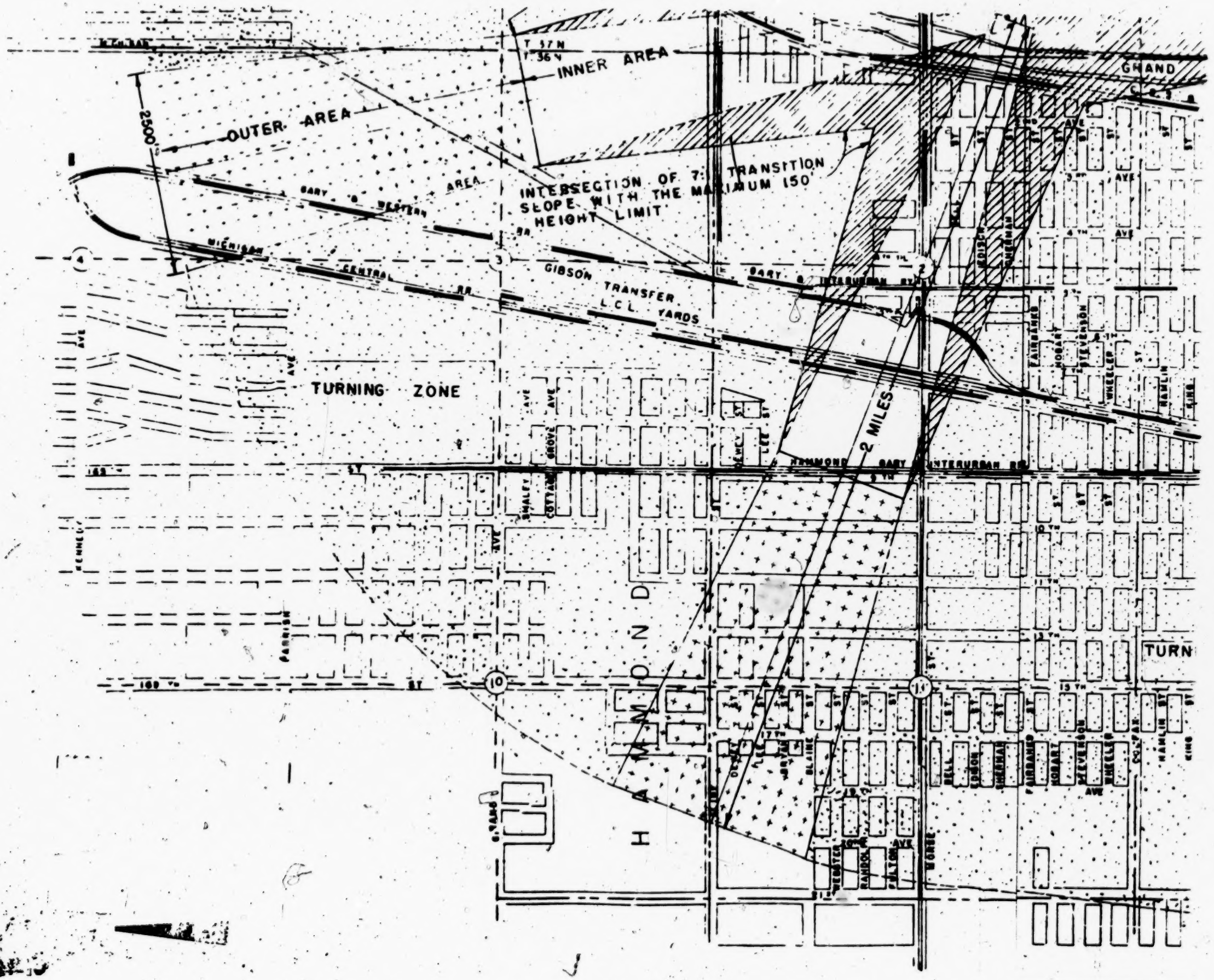
N 43°-20'-00" E

N 5°-58'-30" W

W-SE RUNWAY 150' x 4800'

APRON

471 654 ACRES


INNER AREA
OUTER AREA
2500'
INTERSECTION OF 7: TRANSITION SLOPE WITH THE MAXIMUM 150' HEIGHT LIMIT
GIBSON TRANSFER L.C.L. YARDS
TURNING ZONE
2 MILES
GRAND
HAMMOND
TURN

HIGHWAY U.S. NO. 12

APRON

NW-SE RUNWAY

N 54° 58' 30" W

RM #6

50' X 4800'

S 46° 33' 52" E

N 89° 50' 30" W

317.16'

6	589 31	TOP
9	585 39	TOP
22	587 57	TOP
23	590 35	TOP
25	591 93	TOP
27	585 73	TOP
28	584 40	TOP

9	583 89	TOP OF CONCRETE MONUMENT 2' R OF E W RUNWAY AT STA 13+26
22	587 97	TOP OF 1/2" IRON PIPE 100' S E OF STA 72+00 NW-SE RUNWAY.
23	590 35	TOP OF 1/2" IRON PIPE 300' RT OF STA 65+50 NW-SE RUNWAY.
25	591 93	TOP OF 1/2" IRON PIPE 728.8' RT OF STA 55+20 NW-SE RUNWAY.
27	585 73	TOP OF 1/2" IRON PIPE 555.4' RT. OF STA 31+74 E-W RUNWAY
28	584 40	TOP OF 1/2" IRON PIPE 450' RT OF STA 23+13 E-W RUNWAY

ST. ELGIN, JOLIET & EASTERN R.R.

CORNER TO CORNER 2022.18'
N 0°-12'-26" E 2230.63'

471.654 ACRES

N-S RUNWAY 150' X
N 21°-01'-30" E.

E-W RUNWAY 150' X 4700'
S 79°-01'-30" W.

BM #26
30' X 4800

BM #27

BM #28

BM #29

N 66°-51 W 307.5'

N 71°-33 W 80.12'

N 75°-10 W 149.73'

THREAD OF STREAM

LOW WATER LINE

GOVT MEANDER LINE

4.121 ACRES
(SD OF THREAD OF STREAM)

1088.61

1572.88
N 88°-16 W

SECTION LINE

2108.99

2661.49

N 82°-12 W

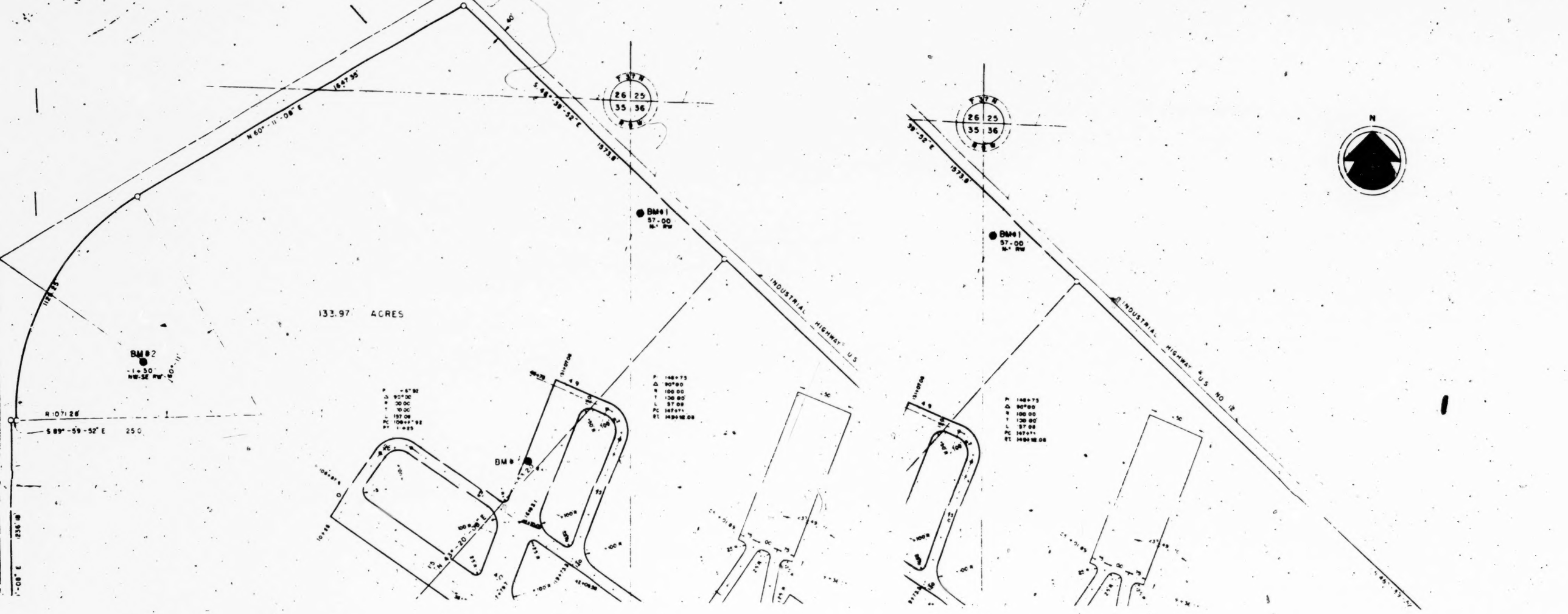
GRAND
N 85°-53 W

N 1°-05 E
1627.91

CALUMET
S 88°-01 W

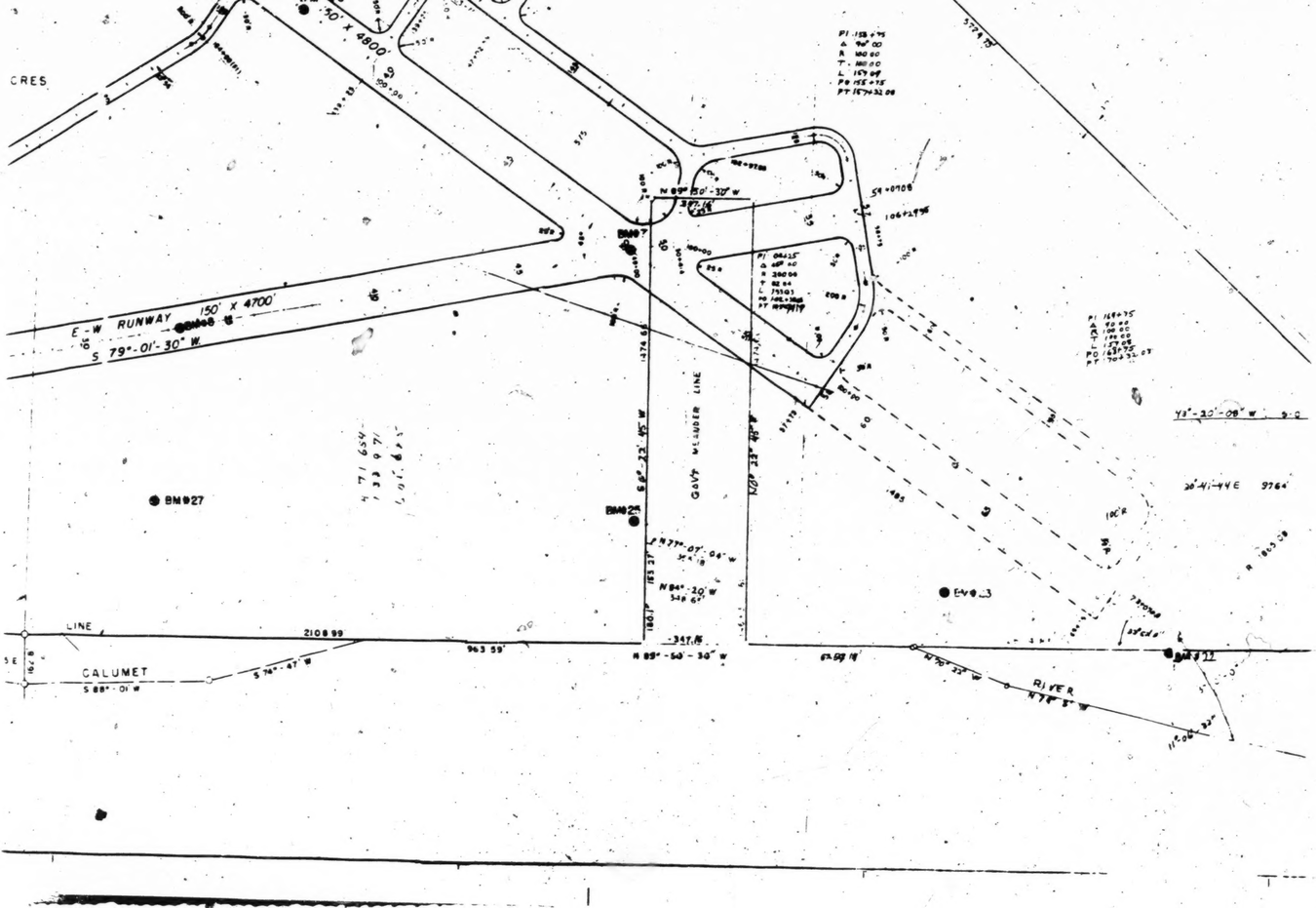
S 74°-47 W

471.654


133.97 ACRES
INDUSTRIAL HIGHWAY - U.S. NO 12
BM # 1
57-00
BM # 2
BM # 3
N 60° - 11' - 08" E 1647.35
S 49° - 38' - 52" E 1573.8
S 89° - 59' - 52" E 250
R 1071.28
N
26 25
35 36

BENCH MARKS

NO	ELEV	DESCRIPTION
US CG	596.686	U.S. COAST & GEODETIC BRONZE PLATE SET IN SOUTH FACE OF NORTH PIER OF E.J.&E. RR BRIDGE OVER PENN. R.R. TRACKS.
1	590.27	TOP OF 1/2" IRON PIPE AT STA. 57+00 N-S RUNWAY.
2	589.35	TOP OF 1/2" IRON PIPE AT STA. -1+50 NW-SE RUNWAY.
3	590.79	TOP OF CONCRETE MONUMENT 57.6' WEST OF STA. 45+36 ON N-S RUNWAY
4	591.44	TOP OF 1/2" IRON PIPE AT INTERSECTION OF N-S & NW-SE RUNWAYS
5	589.66	TOP OF 1/2" IRON PIPE AT STA. 29+00 N-S RUNWAY.
6	591.11	TOP OF 1/2" IRON PIPE AT STA. 36+30 NW-SE RUNWAY.
7	589.39	TOP OF 1/2" IRON PIPE AT INTERSECTION OF NW-SE & E-W RUNWAYS
8	589.31	TOP OF 1/2" IRON PIPE AT STA. 32+44 ON E-W RUNWAY
9	585.59	TOP OF CONCRETE MONUMENT 2' R OF E-W RUNWAY AT STA. 13+26
22	587.97	TOP OF 1/2" IRON PIPE 100' S.E. OF STA. 72+00 NW-SE RUNWAY.
23	590.35	TOP OF 1/2" IRON PIPE 300' RT OF STA. 65+50 NW-SE RUNWAY.
25	591.93	TOP OF 1/2" IRON PIPE 728.8' RT OF STA. 55+20 NW-SE RUNWAY.
27	585.73	TOP OF 1/2" IRON PIPE 555.4' RT OF STA. 31+74 E-W RUNWAY.
28	584.40	TOP OF 1/2" IRON PIPE 450' RT OF STA. 23+13 E-W RUNWAY.



COMPOSITE WIND ROSE

COMPILED FROM VARIOUS AVAILABLE SOURCES

SCALE

0 50 100 200 300 400 500 600 700 800

GARY MUNICIPAL AIRPORT
BOARD OF AVIATION COMMISSIONERS
CITY OF GARY, INDIANA

LAYOUT PLAN

BEINE, HALL AND CURRAN ARCHITECTS AND ENGINEERS
GARY, INDIANA

APPROVED

APPROVED CHIEF AIRPORT ENGINEER

DATE DRAWN BY BLA CHECKED BY

REVISED SHEET G-09

[fol. 1389]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT No. 4

Book 553 Page 378

STANDARD FIXED BASE OPERATORS GROUND LEASE AGREEMENT

THIS AGREEMENT, Made and entered into in duplicate this 23rd day of March, 1950, by and between the CITY OF GARY, a municipal corporation of Lake County, Indiana, acting as by law provided and through its BOARD OF AVIATION COMMISSIONERS, as Lessor herein, and Nick Jankovich and Paul Jankovich, a co-partnership doing business as the CALUMET AVIATION COMPANY, having its principal office and place of business in Lake County, Indiana, and referred to as Lessees herein.

WITNESSETH:

WHEREAS, the Lessor herein is the owner of the Gary Municipal Airport located in that part of the East ½ Sec. 35, Twp. 37, Range 9 West of the 2nd P.M. lying between CLS & E Railroad and Grand Calumet River, and that part of the West ½ Sec. 36, Twp. 37, Range 9 West, lying between U. S. Highway 12 and Grand Calumet River, and that part of SE¼ Sec. 36, Twp. 37, Range 9 West, lying between U. S. Highway 12 and Grand Calumet River, and that part of the SE¼, Sec. 26, Twp. 37, Range 9 West, lying between the CLS & E Railroad and U. S. Highway 12, containing 610 acres, more or less, (commonly known as the Gary Municipal Airport site) all in the City of Gary, Lake County, Indiana, and

WHEREAS, the Lessor desires to grant and lease unto the Lessees certain parcels of lands located upon said airport, together with certain privileges, rights, uses and interests therein, exclusive or otherwise, as hereinafter set out, and

WHEREAS, the Lessees desire to obtain and avail themselves of the said privileges, rights, uses and interests therein from the said City of Gary, acting as aforesaid, and all as hereinafter set forth, NOW THEREFORE:

Book 553 Page 379

[fol. 1390]

ARTICLE I

1. DESCRIPTION OF PREMISES DEMISED
2. PRIVILEGES, USES, RIGHTS AND INTERESTS DESCRIBED
3. DEFINITION OF FIXED BASE OPERATOR

1. The Lessor, in consideration of the compensations and the sundry covenants and agreements set forth herein to be kept and performed by the Lessees, does hereby and by these presents demise and lease unto the Lessees conditionally, as hereinafter set forth, all of which the Lessees accept conditionally, as aforesaid, the following premises, and attendant privileges, uses, rights and interests hereinafter described, to-wit: plot A in aviation commercial lease plot area, location of which is set forth in Exhibit I, stipulated and agreed between the parties to be correct, designated as Plat No. 1 and by reference made a part hereof, together with the general use of all functional facilities and improvements of a public nature which are now or may hereafter be connected with or appurtenant to said airport, except as hereinafter provided, to be used by Lessees as a fixed base operation as herein defined and for no other purpose.

(a) It is stipulated and agreed between the parties that a complete plat of the entire airport, containing the correct designations of all areas thereon, together with the uses to which said areas may be subjected, shall be attached to this lease and by reference made a part hereof, and it is specifically stipulated and agreed that after the execution hereof, no alteration of said plat or change of said uses shall be made without the specific consent of the Lessees herein.

(b) Specifically, it is understood and agreed that Zone T shall at all times be considered by the parties hereto as being an area of general and public functional use, open to these Lessees, and any other airport Lessee, and it shall be maintained free and clear of limited, restricted or exclusive non-scheduled aviation commercial operations; pro-

[fol. 1391] vided, that any Lessee of any plot or parcel of land containing 15,000 sq. ft. or more within the areas designated as aviation commercial lease plots as set forth in Exhibit I, attached hereto, shall have an option, right and privilege to occupy general office space in any terminal or similar public and functional building constructed in said zone for purposes directly connected with the business operated on the premises theretofore leased, and all upon like and equal terms with each other.

(c) It is specifically stipulated and agreed between the parties hereto that the Lessees shall at all times maintain all of its aircraft in a lawful manner and conform to all of the rules and regulations of any properly constituted authority having jurisdiction over activities engaged in by the Lessees herein. This clause refers specifically to state and federal authorities.

2. In addition to the general privileges, uses, rights and interests attaching to the demised premises h einbefore described and without limiting the generality thereof, the following particular privileges, uses, rights and interests are demised to the Lessees, to-wit:

(a) The loading and unloading of airplanes owned, leased, or operated by the Lessees in any lawful activities.

(b) The servicing and maintaining of airplanes owned, leased, sold or operated by the Lessees.

(c) The maintenance and servicing of airplanes, which shall include overhauling, rebuilding, repairing, inspection and licensing of same, and the purchase and sale of parts and accessories therefor.

(d) The right to maintain a business of buying and selling airplanes, parts, and accessories therefor, aviation equipment of all descriptions, either retail or wholesale or as a dealer; tobaccos, confections and refreshments vended

[fol. 1392] by coin operated machines; and to maintain on said premises appropriate facilities for the conducting of said business.

(e) The training on the airport of personnel in the employ of the Lessees, and other persons or members of the public generally as students, or otherwise, in any art, science, craft or skill pertaining directly or indirectly to aircraft.

(f) The free and unrestricted use of airfield facilities and navigational aids and facilities relating thereto for purposes of commercial and non-commercial landings, take-offs and taxiing, except local passenger hopping for hire which hereby is specifically prohibited.

(g) Particularly and at all times set out herein, the Lessees shall have the full and unrestrieted use of and a right of ingress to and egress from the demised premises, which shall extend to its officers, agents, servants, employees, patrons, invitees, and suppliers of service; all of which shall also extend to the airplanes, vehicles and other property of said persons and the Lessees without charge therefor except the considerations set out herein, excepting however, a reasonable charge for automobile parking by patrons and invitees.

(h) The Lessees shall have the right, either personally or by contract, to provide for the location, construction, erection, maintenance, or removal of improvements, in any lawful manner, upon or in the demised premises, for the purpose of carrying out any of the activities provided for herein, subject however to the conditions herein generally or particularly set forth.

(i) The Lessor shall have all utilities brought to the limits of the demised premises, and the Lessees shall have the privilege of connection therewith without charge.

3. A fixed base operator, as herein set forth is hereby defined as an operator engaging in the sales, renting, leasing, and operation of aircraft for business, pleasure, and

[fol. 1393] industrial purposes including as related phases, the repair, overhauling, rebuilding and modification of aircraft and accessories including the instruction of pilots and the activities set forth in Article I, Section 2, Subsection (a) through (e) as an integrated operation including the selling of aircraft and the conduct of any non-scheduled type of flight operations for commercial purposes.

ARTICLE II

OPTIONS

1. The Lessees shall have an option, which shall be superior to all owners of later dated leases on said airport, which may be exercised at any time during the life of this lease, to lease the lands and parcels of lands lying in the aviation commercial lease plot area designated in Exhibit I as aviation commercial lease plots, and upon like terms and conditions as herein set out. Provided, however, that at any time before said option is taken up by the Lessees, the Lessor herein by exhibiting to the Lessees a bonafide proposal, or proposals, to lease said lands or parts or parcels thereof, together with a performance bond conditioned upon a time certain within which to execute said lease and to develop said property, shall require the Lessees to elect whether to exercise its option herein, provided further, that the Lessees shall first have a right to exercise its option upon said parcels of land upon like terms and conditions as set forth in said proposal, (or most satisfactory proposal to Lessor if more than one); provided further, that the Lessees shall have a period of twenty (20) days from the date of such notice setting forth the conditions of such pro-

posal as aforesaid within which to take up said option on like terms as aforesaid.

ARTICLE III

UNDERTAKINGS OF LESSEES WHICH ARE CONSIDERATIONS HEREIN

Book 553 Page 383

[fol. 1394] 1. Lessees agree to construct on parcel S a minimum of twenty (20) "T" hangars corresponding to minimum requirements set out herein, and any additional "T" hangars as may be required by public demand.

2. The Lessees agree to provide suitable maintenance of the taxi strips or parts thereof referred to in subsection 2 of Article V hereof.

3. The Lessees agree to maintain the lands demised, and the improvements and appurtenances thereto, in a reasonably presentable condition consistent with good business practice.

4. Lessees also agree to lay out and construct within 180 days from the execution hereof or subsequent option lease as provided for herein, in the aviation commercial lease plot area, a service hangar having a minimum of 6,000 sq. ft. of hangar space, and also such other additional improvements as may be required by public demand.

5. Lessees agree that all purchases of aviation gasoline and fuels shall be from the field bulk plant. The Lessees further agree to pay field use charges as provided for by the field bulk plant operator and also shall furnish satisfactory bond guaranteeing payment of said gasoline and fuels and field use charges.

ARTICLE IV

TERM OF LEASEHOLD

1. The term of this lease shall be for a period of twenty (20) years from the date of execution of same with an option to be exercised by Lessees for an additional ten (10)

year period; provided however, that written notice of the exercise of said option shall be served upon Lessor not less than ninety (90) days before the termination of said lease; provided, however, that where the Lessees exercised their option and enter into a lease upon other lands, parts, or parcels thereof described under the option provision

[fol. 1395] herein, the term of such lands as may be leased by virtue of said option shall likewise extend for a period of twenty (20) years from the day said option is exercised and lease executed as well as an option for an additional ten (10) years as hereinbefore set out and upon the identical conditions and provisions as herein set forth. Provided, that in the event the rights and privileges hereunder are suspended by reason of war or other national emergency, the term of this lease shall be tolled during such suspension.

ARTICLE V

RENTALS

1. In aviation commercial lease plots 125 ft. deep by 200 ft. long, base rate of $0.04 sq. ft. per year for the full net area leased.

2. In Zone S, storage area, a base rate of $0.02 sq. ft. per year for the actual ground area occupied by buildings constructed thereon. Lessor to provide usable taxi ways between T hangars, the surface of which shall support a minimum wheel load of 1500 lbs.

3. The rents herein provided for shall be paid monthly in a sum equal to 1/12 of the rents due hereunder in advance on the first day of each and every month beginning with the first day of April, 1950.

4. Provided, however, that the above set forth base rates shall increase or decrease in accordance with the increases or decreases for any calendar quarter (three months) of the averaged indices of the United States Bureau of Labor

Statistics for Hourly Wage Rates of all workers in manufacturing and of all Commodity Wholesale Prices; provided, however, that said base rates shall not be adjusted unless the computation as aforesaid shall result in a change in the base rates of $0.005 or more per sq ft. in the aviation

[fol. 1396] commercial area and $0.0025 per sq. ft. in Zone S, storage area. This clause is bilateral and can be exercised by either party.

As of date of this agreement, the U.S. B.L.S. index for Hourly Wage Rates for all manufacturing employees is $1.418, and the Commodity Wholesale Price index is 151.6. All increases or decreases shall use these indices as their base.

ARTICLE VI

TERMINATION OF LEASE, CANCELLATION, ASSIGNMENT AND TRANSFER

1. This lease shall terminate at the end of the full term thereof, and the Lessees shall have no further right, or interest in any of the lands hereby demised, except as herein provided and as may be exercised under the option provisions herein, and the Lessor shall be entitled to have the lands demised herein returned to it in the same condition in which it was originally demised and leased; except however, that the Lessees may have thirty (30) days thereafter in which to finally remove any improvements remaining upon said lands at the end of the terms provided for herein, or thereafter may be removed by Lessor at Lessees expense.

2. This lease may be terminated by the Lessees at the end of any twelve (12) month period after the execution of same; subject, however, to a ninety (90) day notice to the Lessor previous to the time when said lease is to be terminated, and Lessees shall restore the premises to its original condition within the time and as provided in Paragraph 1 of this article. This section shall also extend in like manner to any lands which may be leased by virtue of the option provided herein and under like conditions.

3. (a) In the event the Lessor for economic or other reasons shall decide to release itself from the obligation of maintaining the airport facilities, this lease shall remain in full force and effect; provided however, that the Lessees

[fol. 1397] shall have the option, either by themselves or in conjunction with other operators and/or users, to take over and maintain by themselves in a reasonable adequate manner said airport facilities as a municipal airport, or the parties may by mutual agreement determine to share the cost of said maintenance. In the event the Lessees and/or other operators or users shall elect to continue the maintenance of said airport said Lessees shall continue to pay the rentals and other payments herein proposed or any rentals and other payments provided for in other leases, but may deduct from any and all said rentals and other payments the actual cost of maintaining the facilities not otherwise required to be maintained by them under this lease; the Lessees do hereby agree that in said event, they will continue to keep all books and records in the same manner as provided herein. The cost of maintenance and payment of rents however, shall be computed on an annual basis, provided however, that in no case shall the Lessor be liable for any maintenance costs.

(b) In the event of said release of the Lessor as herein provided, and in the event that the Lessees do not elect to maintain said airport facilities, the Lessor shall pay to the Lessees as liquidated damages the depreciated value of the fixed improvements (for the purpose of this lease said depreciated value shall be computed for the term of this lease), plus a premium of 3% per year of said depreciated value for the unexpired term of this lease, and thereupon all such improvements shall be and become the sole property of Lessor; provided, however, that in lieu of said depreciated value (not including the premium), the Lessees may have the option of removing said fixed improvements and thereupon this lease shall terminate. In the event the Lessor decides to be released from the obligations as pro-

vided for in this section 3(a), such release shall not take place until one year from the date of written notice served upon Lessees or their agents, and furthermore notice of election on the part of Lessees hereunder to exercise their

[fol. 1398] option to take over and maintain the airport factilities under the terms herein provided for shall be given by the Lessees to the Lessor in writing not less than ninety (90) days prior to the expiration of the one year term stipulated above.

(c) In the event the Lessor decides to release itself from the obligation of maintaining said facilities as aforesaid, the Lessor may at any time thereafter on ninety (90) days notice in writing to Lessees, elect to again continue to obligate itself to maintain said airport and the parties shall thereafter remain in the same position under this lease as before said change in condition.

(d) The Lessor may at any time elect to abandon any and all functional facilities placed upon said airport with the exception of runways, aprons, taxi-ways, ramps, approaches, and airfield lighting facilities.

4. Default of payment of any of the rentals reserved herein to the Lessor shall give the Lessor the right to terminate said leasehold at any time after ninety (90) days notice has been given the Lessees, unless within said time the Lessees have fully complied with the rental provisions hereof; and where this leasehold is finally terminated said land shall be restored to its original condition as provided in paragraph 1 of this article. Provided further, that at any time before this leasehold has been terminated by virtue of this paragraph, the Lessees shall have the right to sell, assign and/or transfer this lease as herein otherwise provided and upon tendering to the Lessor the full amount of the rentals reserved and due.

5. The Lessor shall have the right and privilege of cancellation of this leasehold for any violation of the conditions and provisions hereof other than non-payment of

rentals reserved herein, and such cancellation may be had by application to any Circuit or Superior Court having jurisdiction over the parties and subject matter hereof, and on a trial of issues properly joined in said Court. In case a

[fol. 1399] judgment declaring cancellation of this leasehold is entered by such Circuit or Superior Court hearing said matter as herein provided, the Lessees shall have ninety (90) days after the rendering of such judgment to restore the land to its original condition, and to remove any and all of the improvements thereon during said time.

6. The Lessees shall have the right and privilege of sale, assignment and/or transfer of this leasehold outright, or in part, or as security for obligations incurred incidental to improvements upon said lands demised herein; provided, however, that outright sale, assignment and/or transfer of this leasehold including the transfer in whole or in part to other than recognized financial institutions to secure obligations incurred incidental to improvements, shall be upon notice to the Lessor stating the name and address of the proposed buyer, assignee, and/or transferee. If the Lessor shall determine that said proposed buyer, assignee, and/or transferee is objectionable, such objection shall be stated in writing to the Lessees within twenty (20) days after notice of such proposed sale, assignment, and/or transfer, and the Lessor shall have the right to procure an injunction from any Circuit or Superior Court having jurisdiction over the parties and subject matter herein, preventing such sale, assignment and/or transfer, as the case may be, upon a proper showing to the satisfaction of said Court that the proposed buyer, assignee and/or transferee is financially incompetent, or is an undesirable or bad character, or that said proposed sale, assigment, and/or transfer is in bad faith, or is not bonafide.

7. The Lessees shall have the right in any event and without regard to any other provisions herein contained, to sell, assign and/or transfer this leasehold together with all rights, privileges and interests hereunder to a corpo-

ration in which the persons now associated together as the Lessees are majority stockholders.

Book 553 Page 389

[fol. 1400]

ARTICLE VII

NOTICES

1. All notices required or which may be given under the provisions of this lease shall be addressed to the respective parties herein as follows:

Board of Aviation Commissioners
City Hall
Gary, Indiana

Calumet Aviation Company
Gary Municipal Airport
Gary, Indiana

and may be sent by registered mail, or by telegram, or by personal service by handing a true copy thereof to the chairman of the Board of Aviation Commissioners or the president, secretary, or such lawfully designated agent appointed for the purpose of receiving service of process upon the Lessees.

ARTICLE VIII

GENERAL PROVISIONS

* * *

1. MINIMUM IMPROVEMENT REQUIREMENTS
2. INDEMNIFICATION
3. LIMITATION OF CONTRACTS TO OTHER LESSEES AND CONTRACTORS
4. JUDICIAL RELIEF DAMAGES
5. CONCESSIONS EXCLUDED
6. ARBITRATION

1. (a) "T" hangars shall be constructed of weather resistant metal, or equivalent, siding and roofing attached to

suitable metal, or equivalent, frame work designed to withstand a minimum of 25 lb. p.s.f. roof load and 30 lb. p.s.f. wind load. Doors shall be attached by suitable fastenings at the top thereof either to swing in under the roof or to be moved at right angles to the opening. No door wider than 4′ shall be permitted to swing outward from said hangar. A suitable foundation shall be provided with hangar posts and supports anchored thereto capable of withstanding [fol. 1401] the minimum vertical and horizontal loads above set out.

(b) Service buildings shall be constructed with approved fireproof materials. Dope rooms shall be properly partitioned off and ventilated to a degree sufficient to prevent explosions of combustible materials. Approval of the State Fire Marshal's Office shall be required on all service building layout and construction. Service office buildings shall be constructed of fireproof materials and shall not house combustible materials except in such manner as shall be approved by the State Fire Marshal's Office; outside building plans shall be approved by the Lessor and approval shall not be unreasonably withheld.

(c) Storage of fuel in "T" hangars, service buildings, or constructions attached thereto shall in nowise be provided or permitted except as may be confined to the tanks of aircraft or vehicles stored or housed within such buildings.

2. The Lessor shall stand indemnified by the Lessees as herein provided. It is expressly understood and agreed by and between the parties hereto that the Lessees herein are and shall be deemed to be an independent contractor and operator responsible to all parties for its respective acts or omissions, and the Lessor shall in no way be responsible therefor. It is further agreed that in the use of the airport and in the erection or construction of any improvements thereon, and the exercise and enjoyment of the privileges herein granted, the Lessees agree to indemnify and save

harmless the Lessor from any and all losses that may proximately result to the Lessor from any negligence on the part of the Lessees. The Lessees hereby agree to carry public liability insurance in a minimum sum of $50,000 for one person and $100,000 for two or more persons and in addition thereto to carry a minimum of $100,000 insurance for property damage liability. All of said insurance shall be carried in a company satisfactory to the Lessor. It is understood and agreed that the Lessor will be notified by the

[fol. 1402] insurance company in the event of any renewals or cancellations of said policy and the following clause shall be inserted in said insurance policy: "It is understood and agreed that the Board of Aviation Commissioners of the City of Gary, Indiana, will be notified in the event of any renewal or cancellation of this policy."

3. (a) It is expressly contracted, stipulated, and agreed by the Lessor and the Lessees herein that no contract, lease, or other agreement pertaining to matters and things identical or substantially similar to those set out herein shall be entered into with any other person, persons, firms, corporations, or partnerships, with respect to the Gary Municipal Airport which are more advantageous, or upon conditions less stringent, or at a less rental for comparable lands or parcels thereof to those herein demised, except upon the written consent and authority of the Lessees herein.

(b) The Lessor agrees not to engage directly or indirectly in any of the activities herein described or contemplated. Provided, however, that the Lessor may lease or rent land or hangars for scheduled aviation operations and for non-commercial aviation purposes for or in industrial operations.

4. It is expressly stipulated and agreed between the parties hereto that either party shall have an action for damages to be determined by any Circuit or Superior Court having jurisdiction of the persons and subject matter

herein, for breach of any condition or provision herein contained resulting in such damage.

5. It is specifically agreed and stipulated that the following concessions and the establishment thereof are excluded from this contract and lease, to-wit:

1. Ground transportation for hire
2. Western Union
3. Auto rental service
4. Food sales
5. News and sundry sales
6. Advertising concessions
7. Barber, valet and personal services
8. Retail sale of non-aviation products
9. Gasoline and fuels to transient aircraft
10. Passenger hopping for hire (Pleasure flights)
11. Sales of scheduled airline tickets after operation of terminal building

[fol. 1403] Book 553 Page 392

6. It is stipulated and agreed that, in any event and notwithstanding any provisions made in this lease, the parties hereto by mutual agreement may submit to arbitration any question and dispute, except non-payment of rentals arising between the parties hereto as to the meaning and interpretation of any term, condition, or provisions here contained or in respect to any matter of compliance or noncompliance with the terms hereof; said question or dispute shall be submitted to two arbitrators. The Lessor and the Lessees shall each select one and the two so chosen shall then select a competent and disinterested person to serve as a third arbitrator; the arbitrators together shall then consider the question or questions, or the dispute or disputes submitted to them in writing by the parties hereto, and the decision in writing of any two shall determine the

particular question or dispute under consideration. The parties hereto shall bear equally the expense of said arbitration.

ARTICLE IX

INVALID PROVISIONS

1. It is further expressly understood and agreed by and between the parties hereto that in the event any covenant, condition or provision herein contained is held to be invalid by any Court of competent jurisdiction, the invalidity of any such covenant, condition or provision shall in no way effect any other covenant, condition or provision herein contained, unless and provided further, that if the invalidity of any such covenant, condition or provision does materially prejudice either the Lessor or the Lessees in their respective rights and obligations contained in the valid covenants, conditions or provisions in this lease, then the entire lease shall stand void at the option of either party.

[fol. 1404] Book 553 Page 393

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

CITY OF GARY

/s/ C. W. BADER
C. W. Bader

/s/ CARL K. SHAFER
Carl K. Shafer

/s/ H. R. SACKETT
H. R. Sackett

MEMBERS OF THE
BOARD OF AVIATION COMMISSIONERS

LESSOR

ATTEST:

/s/ Louis D. Kuss
Secretary
Louis D. Kuss

NICK JANKOVICH and PAUL JANKOVICH
D/B/A CALUMET AVIATION COMPANY

/s/ NICK JANKOVICH
Nick Jankovich

/s/ PAUL JANKOVICH
Paul Jankovich

LESSEES

[Stamp—State of Indiana S.S. No.
Lake County—Filed for Record—1951 Sep 11 PM 2 15—
Book 553 Page 377—Louis Opachan, Recorder]

In the Porter Circuit Court of
Porter County, Indiana

PLAINTIFFS' EXHIBIT
No. 12

[fol. 1405]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT No. 12

[fol. 1406]

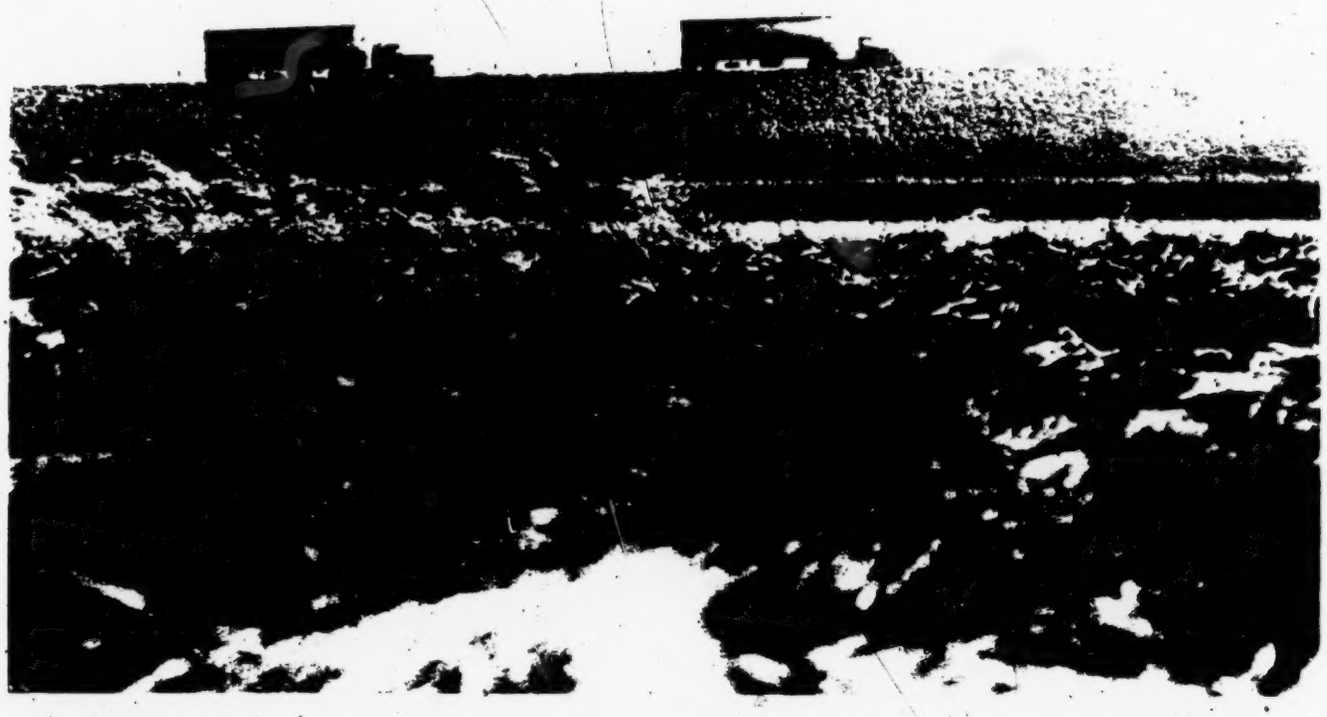
IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 13

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

PLAINTIFFS' EXHIBIT
No. 13



In the Porter Circuit Court of
Porter County, Indiana

Plaintiff's Exhibit No. 15

[fol. 1407]

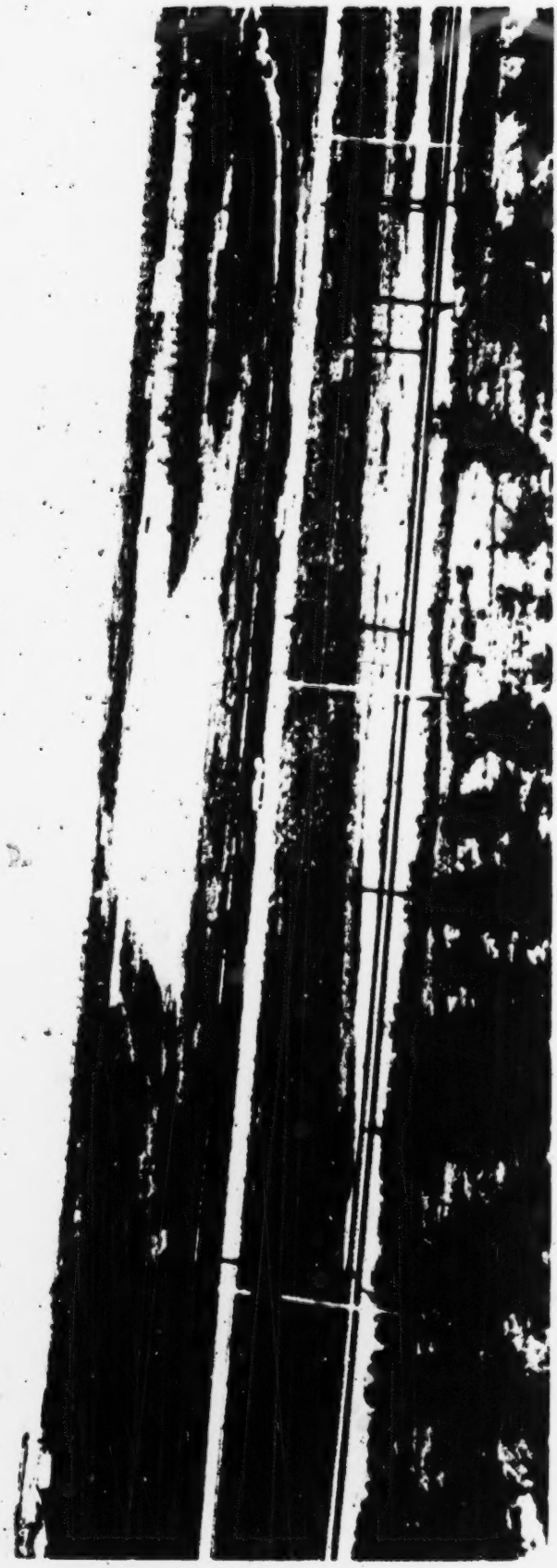
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 14

(See Opposite) ☞

the Porter Circuit Court of
Porter County, Indiana

PLAINTIFFS' EXHIBIT
No. 14

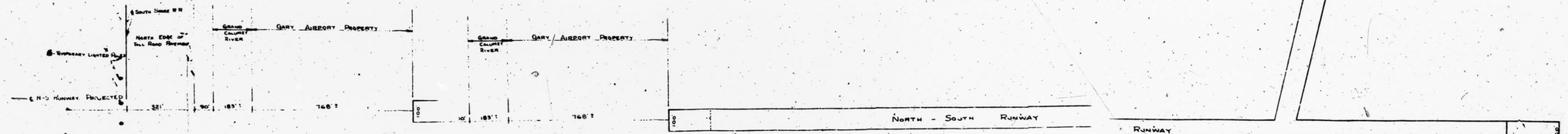


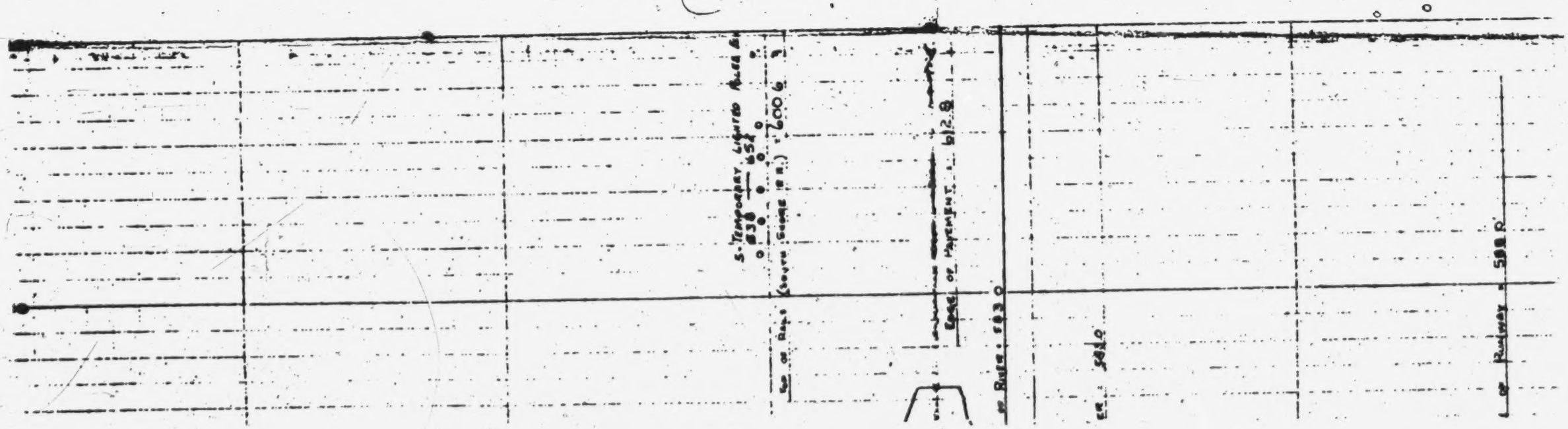
[fol. 1408]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

PLAINTIFFS' EXHIBIT NO. 15

(See Opposite) ☞


℄ South Shore R R
North Edge of Tall Road Pavement
Temporary Lighted Flag
℄ N-S Runway Projected
Grand Calumet River
Gary Airport Property
Grand Calumet River
Gary Airport Property
North - South Runway
Runway

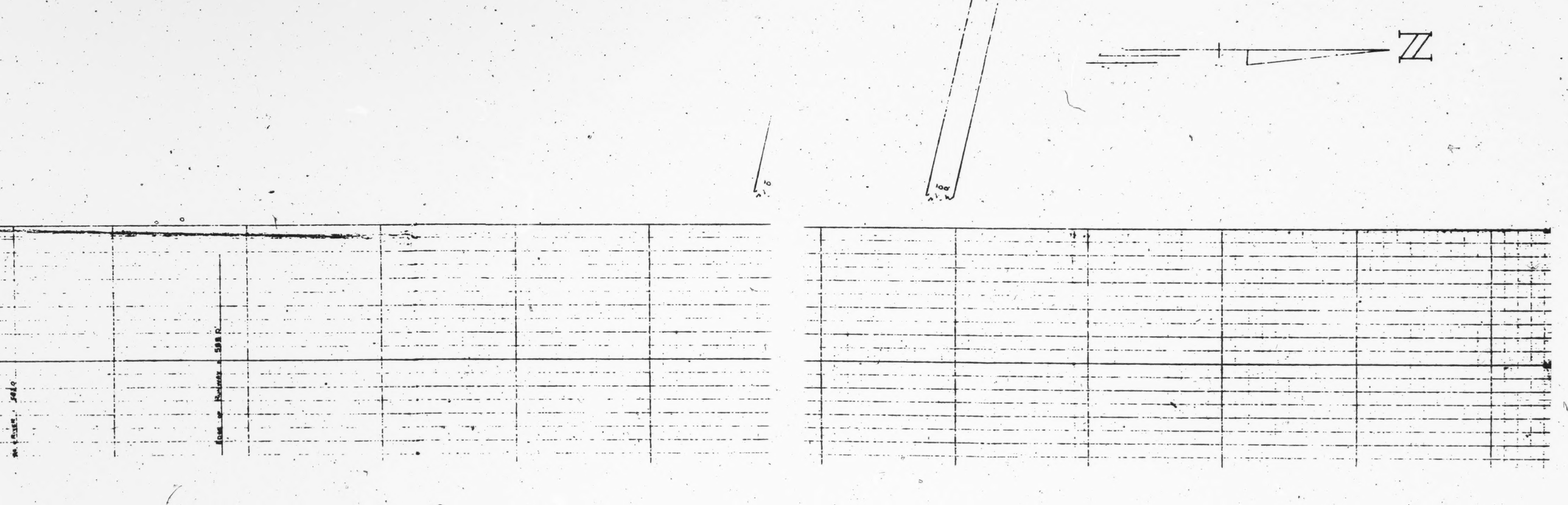


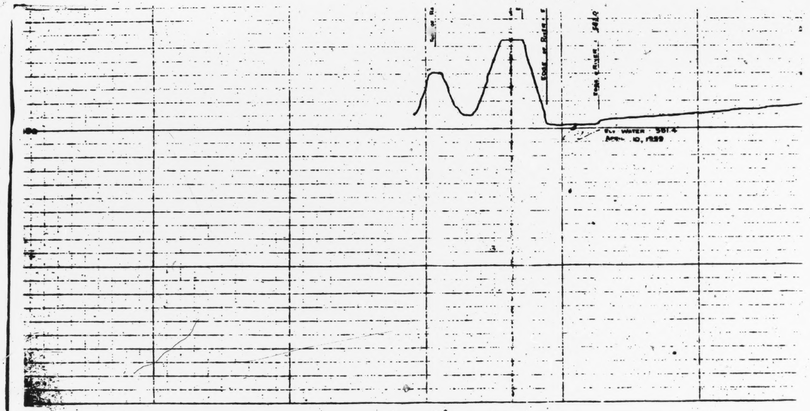
186

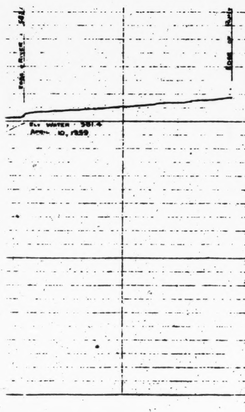
[fol. 1409]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. A



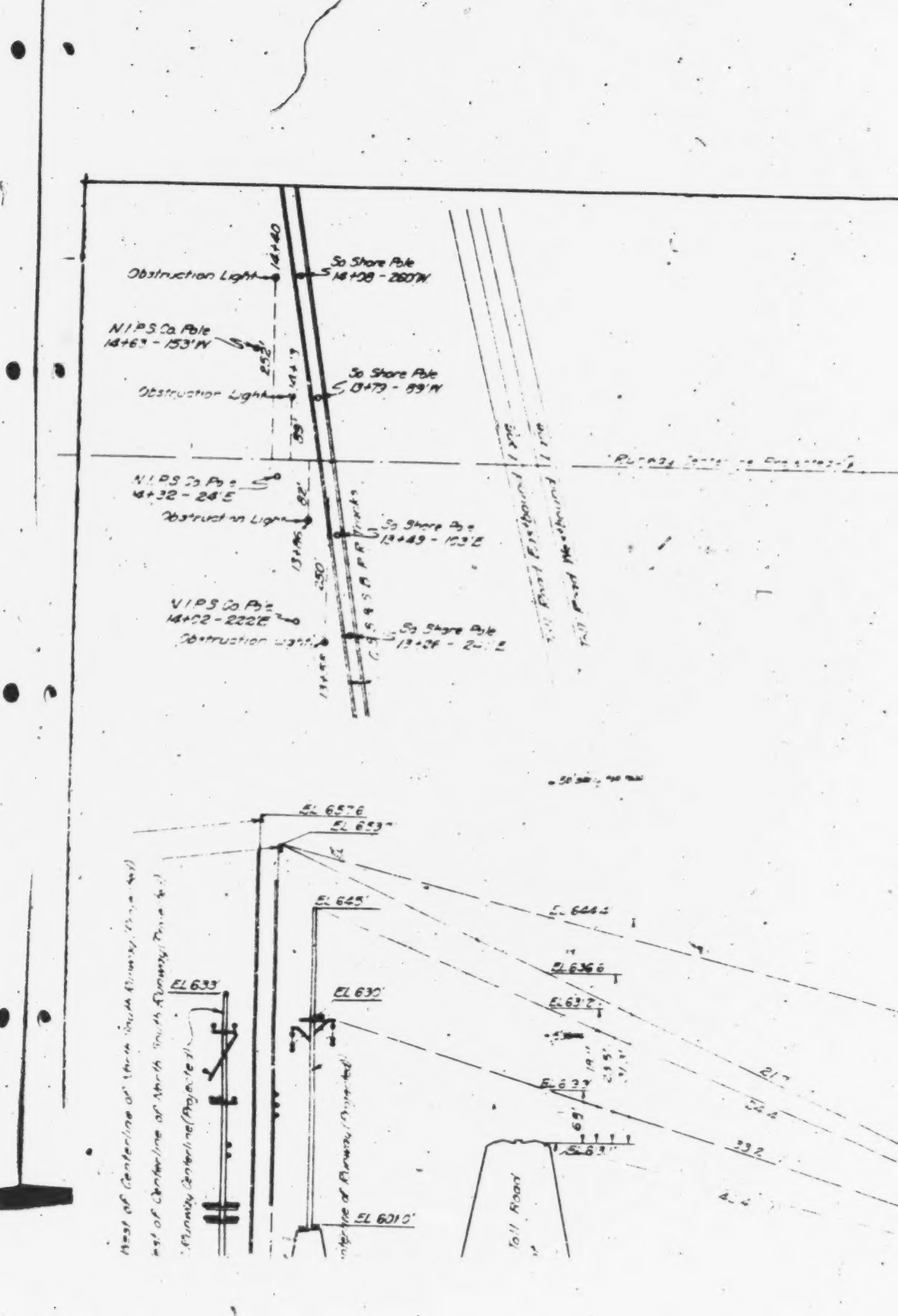




3-27-60

Rowland A. Fabian

1408

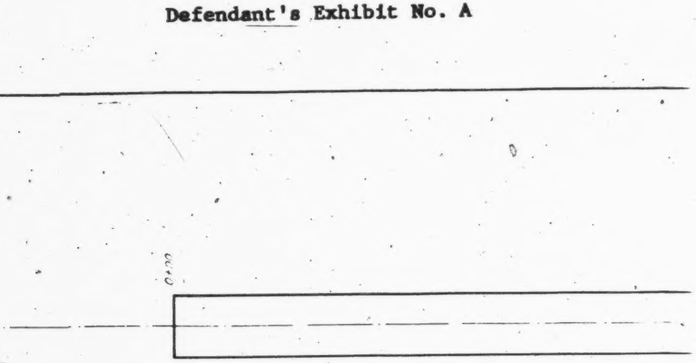

Obstruction Light
14+40
So Shore Pole
14+28 - 260'N
N.I.P.S. Co. Pole
14+63 - 153'N
252'
Obstruction Light
So Shore Pole
13+79 - 99'N
89'
N.I.P.S. Co. Pole
14+32 - 24'E
82'
Obstruction Light
So Shore Pole
13+49 - 103'E
250'
N.I.P.S. Co. Pole
14+02 - 222'E
Obstruction Light
So Shore Pole
EL 657.6
EL 653'
EL 645'
EL 644.2
EL 636.6
EL 633'
EL 630'
EL 627.4
EL 601.0'
Toll Road

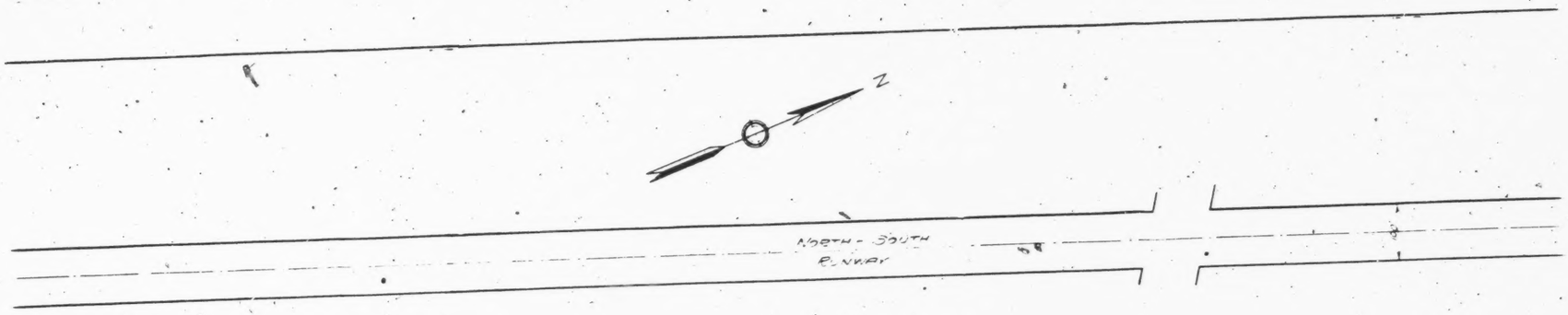
In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. A

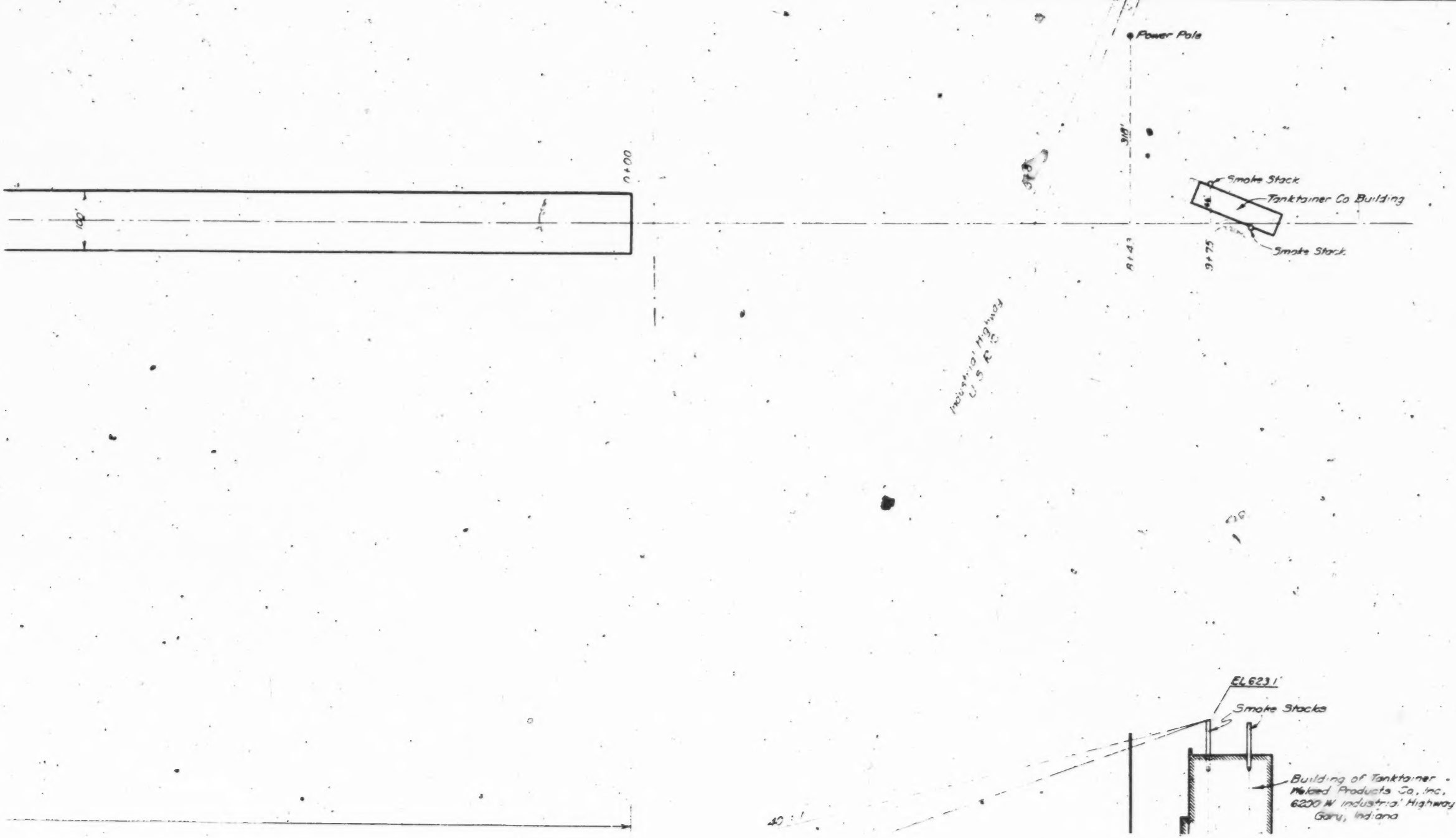
Circuit Court of
nty, Indiana

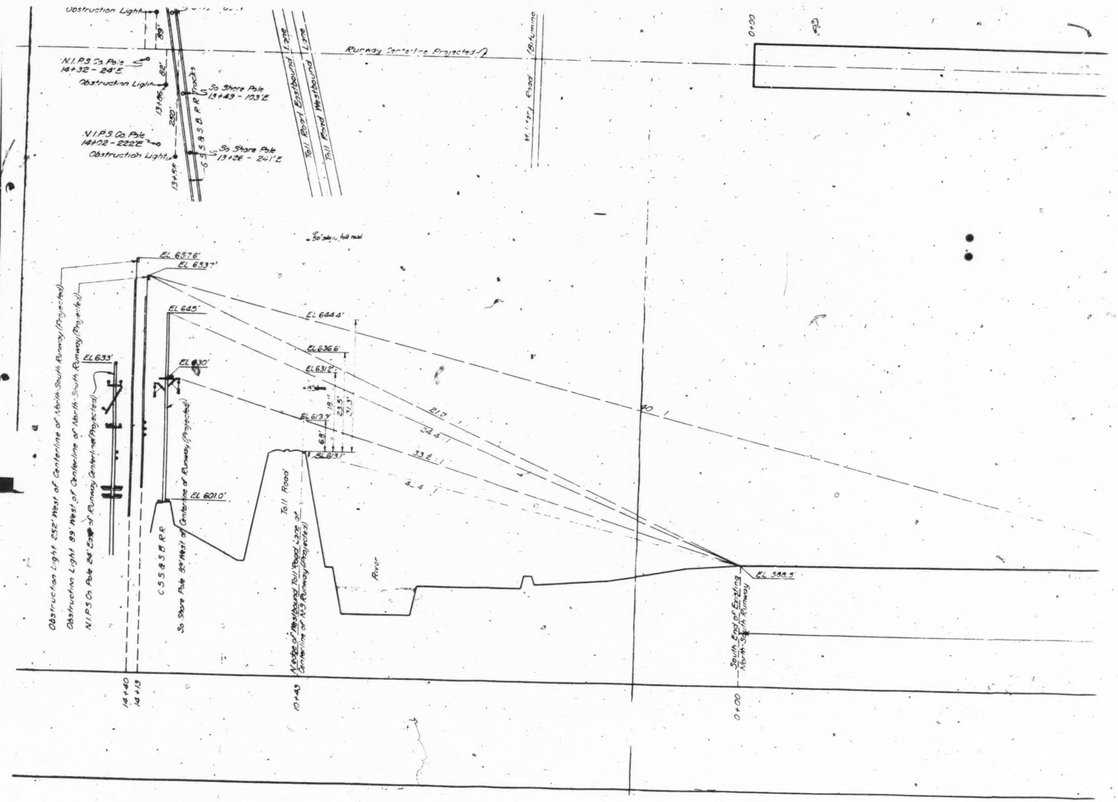
Exhibit No. A

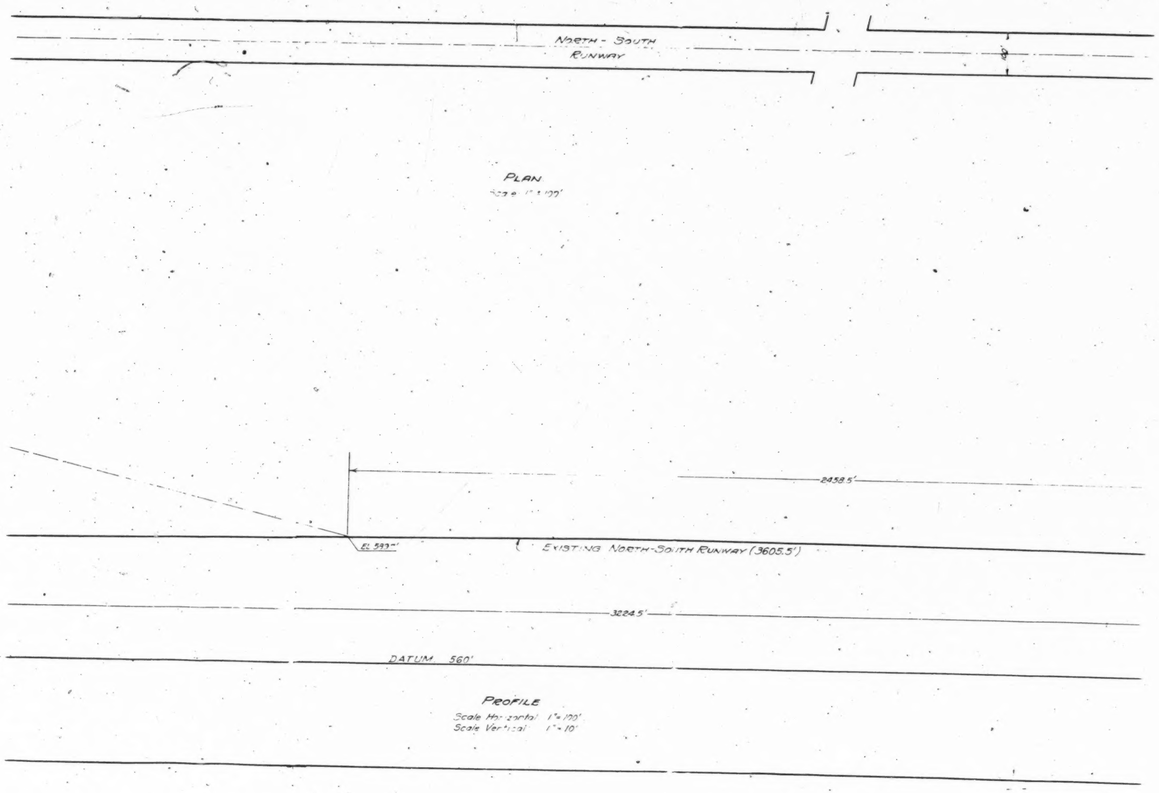


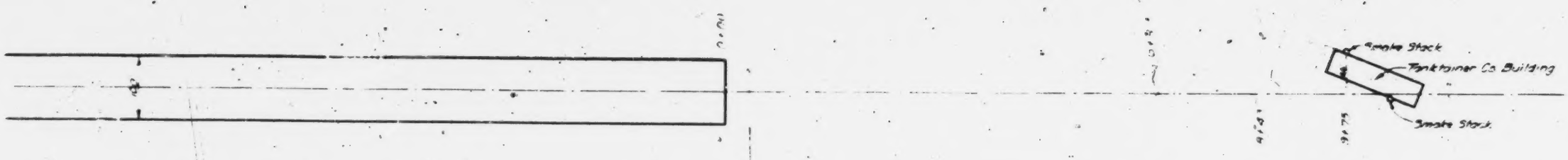


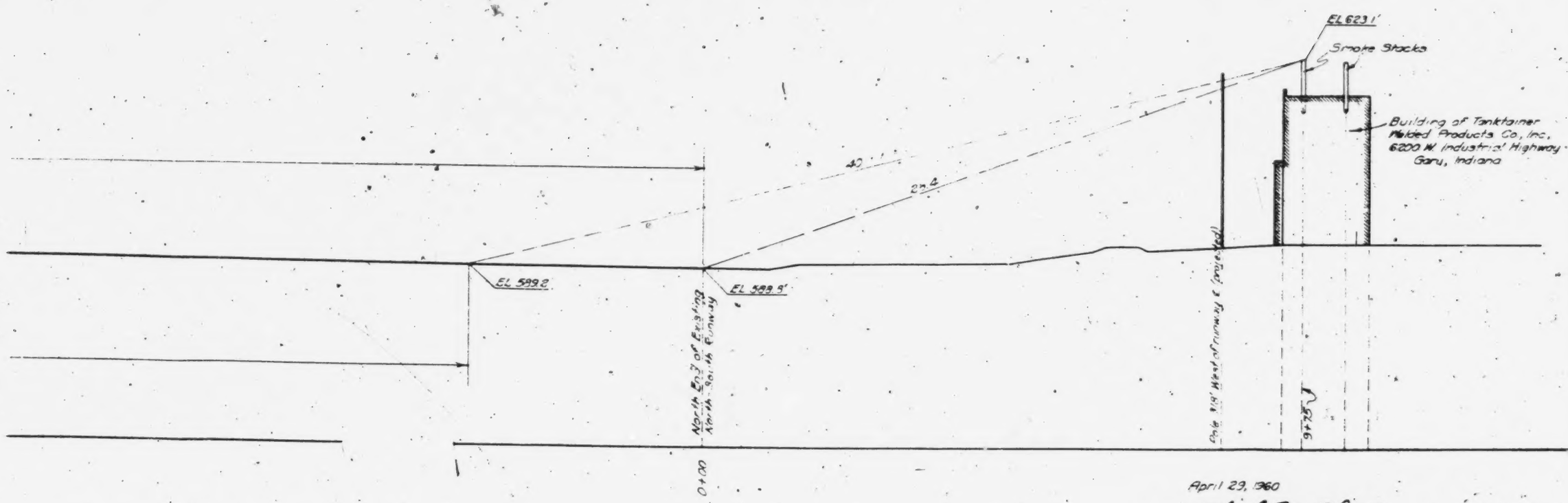
PLAN


Power Pole
Smoke Stack
Tanktainer Co Building
Smoke Stack
0+00
1+43
2+75
EL 623.1'
Smoke Stacks
Building of Tanktainer - Maxed Products Co., Inc. 6200 W Industrial Highway Gary, Indiana


Obstruction Light
N.I.P.S. Co. Pole 14+32 - 84'E
Obstruction Light
N.I.P.S. Co. Pole 14+02 - 222'E
Obstruction Light
So. Shore Pole 13+43 - 193'E
So. Shore Pole 13+26 - 241'E
Runway (existing & projected)
Toll Road Relocated
Toll Road Abandoned
Toll Road
EL 627.6'
EL 633'
EL 685'
EL 655'
EL 630'
EL 644.4'
EL 636.6'
EL 631.2'
EL 607'
EL 601'
EL 601.1'
EL 601.0'
Obstruction Light 252' West of Centerline of North-South Runway (Projected)
Obstruction Light 89' West of Centerline of North-South Runway (Projected)
N.I.P.S. Co. Pole 84' East of Centerline of Runway (Projected)
C.S.S.&S.F.R.R.
So. Shore Pole 84' West of Centerline of Runway (Projected)
Toll Road
Toll Road 132' West of Centerline of N-S Runway (Projected)
River
EL 588.9
South End of Existing North-South Runway
14+40
14+43
11+43
0+00


North - South Runway
Plan
Scale 1" = 100'
2458.5'
EL 599.1'
Existing North-South Runway (3605.5')
3284.5'
Datum 560'
Profile
Scale Horizontal 1" = 100'
Scale Vertical 1" = 10'





April 29, 1960

Stanley M. Shartle

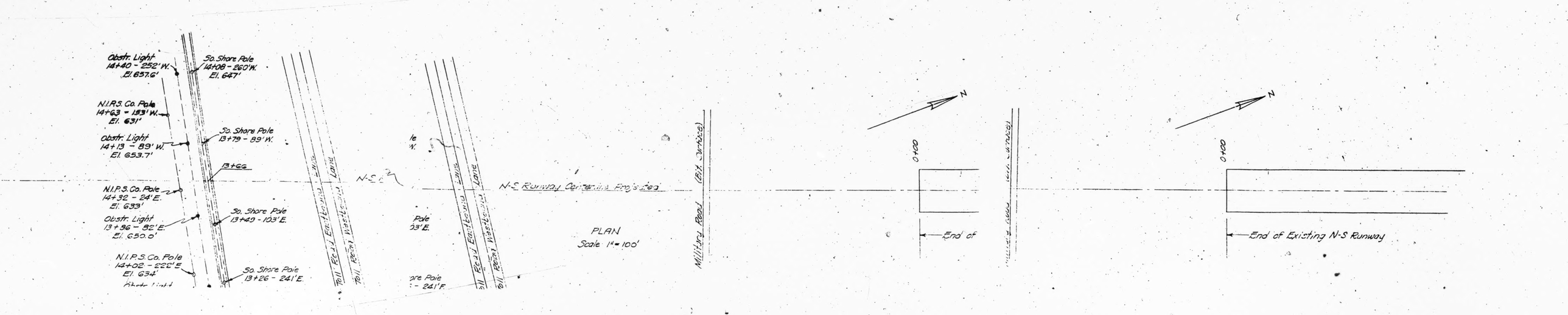
Registered Professional Engineer No 6208

[fol. 1410]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

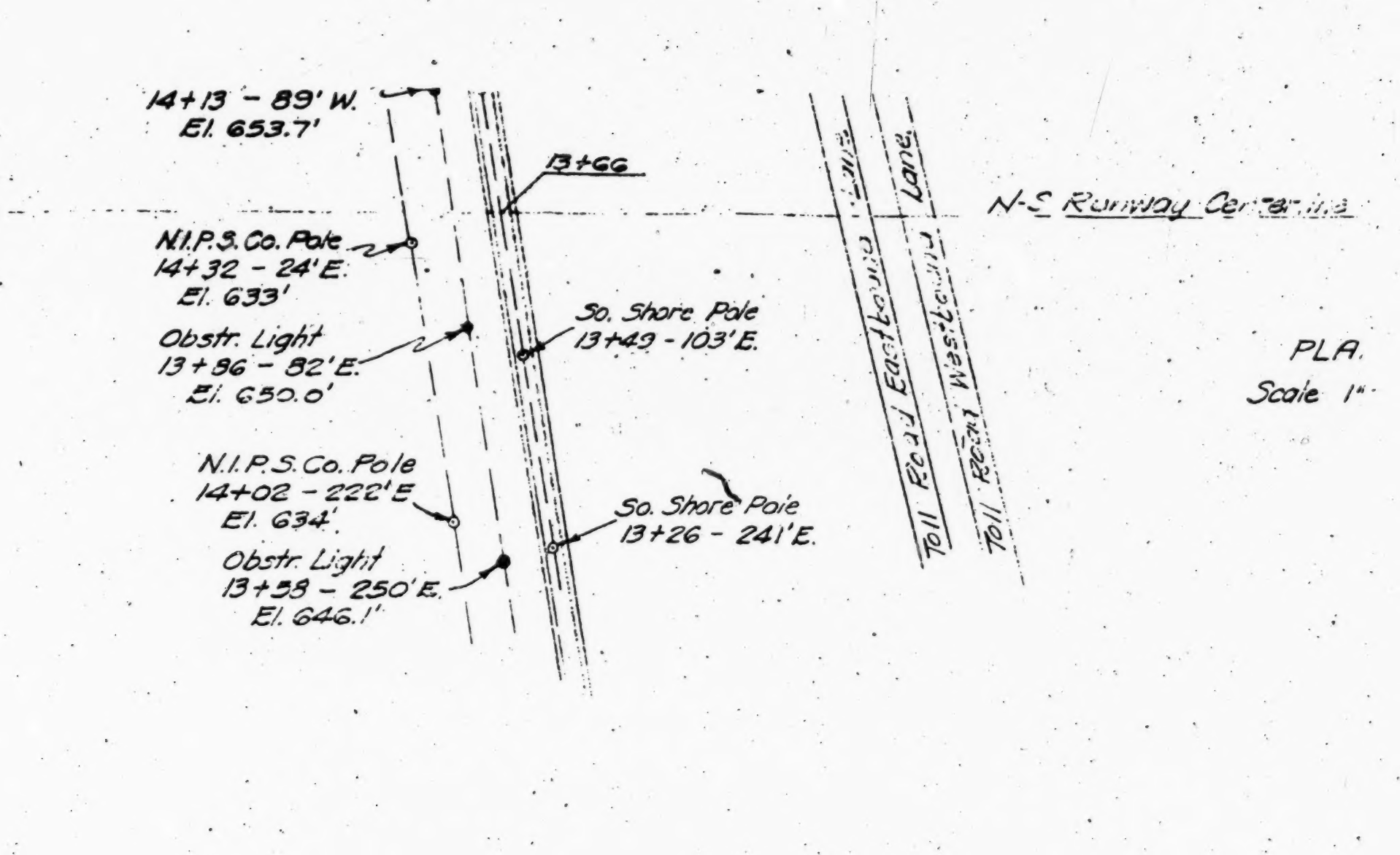
DEFENDANT'S EXHIBIT NO. B

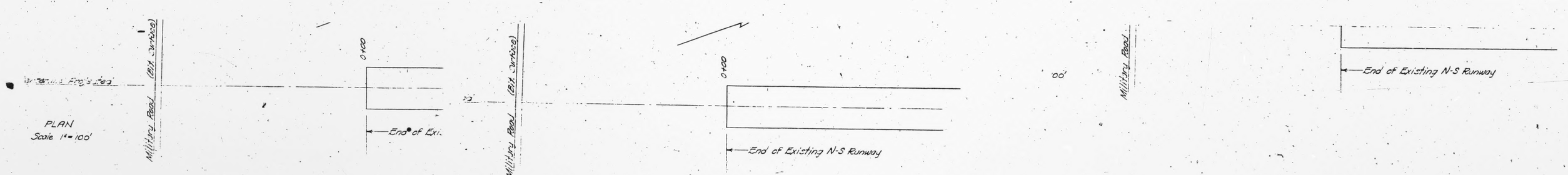
(See Opposite) ☞

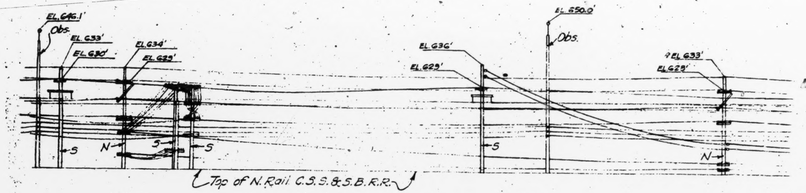

Obstr. Light
14+40 - 252' W.
El. 657.6'
So. Shore Pole
14+08 - 260' W.
El. 647'
N.I.P.S. Co. Pole
14+63 - 183' W.
El. 631'
Obstr. Light
14+13 - 89' W.
El. 653.7'
So. Shore Pole
13+79 - 99' W.
13+66
N.I.P.S. Co. Pole
14+32 - 24' E.
El. 633'
Obstr. Light
13+96 - 82' E.
El. 650.0'
So. Shore Pole
13+49 - 103' E.
N.I.P.S. Co. Pole
14+02 - 222' E
El. 634'
So. Shore Pole
13+26 - 241' E.
Toll Road Eastbound Lane
Toll Road Westbound Lane
N-S Runway Centerline Projected
Military Road (Ext. Junction)
PLAN
Scale 1" = 100'
N
End of
End of Existing N-S Runway

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. B


14+13 - 89' W.
El. 653.7'
13+66
N-S Runway Center Line
N.I.P.S. Co. Pole
14+32 - 24' E.
El. 633'
Obstr. Light
13+86 - 82' E.
El. 650.0'
So. Shore Pole
13+49 - 103' E.
N.I.P.S. Co. Pole
14+02 - 222' E
El. 634'
Obstr. Light
13+58 - 250' E.
El. 646.1'
So. Shore Pole
13+26 - 241' E.
Toll Road East bound Lane
Toll Road West bound Lane
PLA
Scale 1"

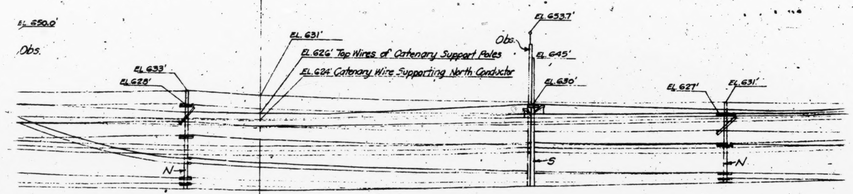

Military Road (Bit. Surface)
End of Existing N-S Runway
PLAN
Scale 1"=100'
Military Road (Bit. Surface)
End of Existing N-S Runway
Military Road
End of Existing N-S Runway



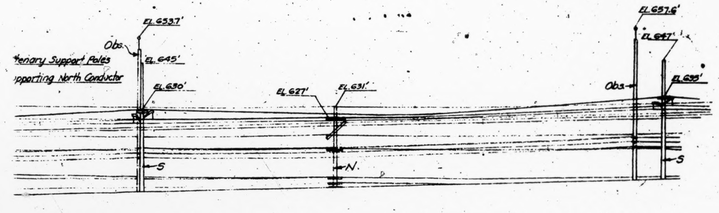
LEGEND

Obs - Obstruction Light & Pole
N - N.I.P.S.Co. Pole
S - C.S.S.&S.B.R.R. Pole

DATUM 550'

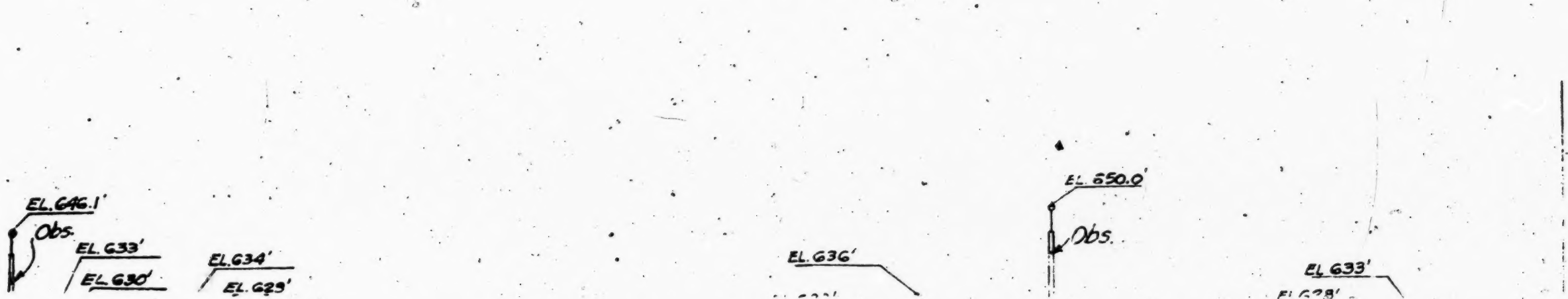


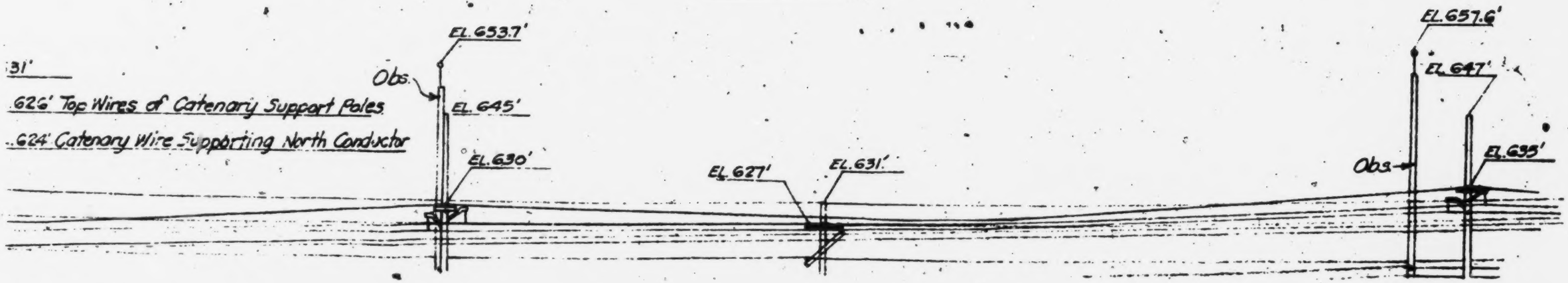
Scale 1" = 20'



April 27, 1960

Stanley M. Shartle
Reg. Prof. Eng. No. 6208


EL. 646.1'
Obs.
EL. 633'
EL. 630'
EL. 634'
EL. 629'
EL. 636'
EL. 650.0'
Obs.
EL. 633'

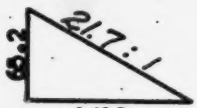
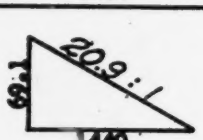
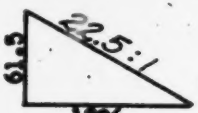

31'
626' Top Wires of Catenary Support Poles
624' Catenary Wire Supporting North Conductor
EL. 653.7'
Obs.
EL. 645'
EL. 630'
EL. 627'
EL. 631'
EL. 657.6'
EL. 647'
Obs.
EL. 635'

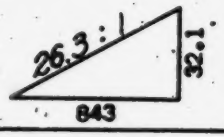
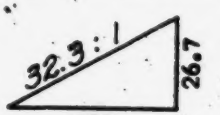
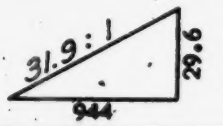
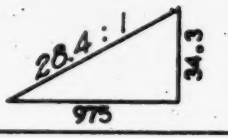
[fol. 1411]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. C

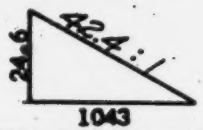
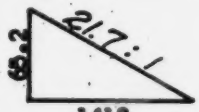
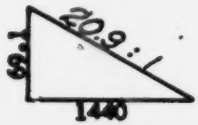
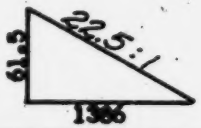
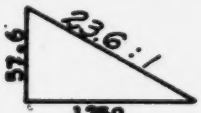
(See Opposite) ☞

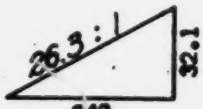
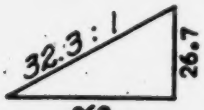
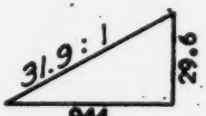
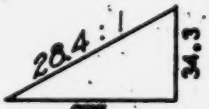
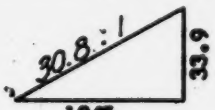
SOUTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.5')
Top of Tall Reed at Runway Centerline Projected (EL. 613.1')	
Obstruction Light 89' West of Runway Centerline Projected (EL. 653.7')	
Obstruction Light 252' West of Runway Centerline Projected (EL. 657.6')	
Obstruction Light 82' East of Runway Centerline Projected (EL. 650.0')	
Obstruction Light	

NORTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.8')
Power Pole 318' West of Runway Centerline Projected (EL. 620.9')	
Power Pole 182' West of Runway Centerline Projected (EL. 615.5')	
Top of Tanktainer Company Building (EL. 618.4')	
Smoke Stack Tanktainer Company Building (EL. 623.1')	
Smoke Stack	

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. C

SOUTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.5')
Top of Tell Road at Runway Centerline Projected (EL. 613.1')	
Obstruction Light 89' West of Runway Centerline Projected (EL. 653.7')	
Obstruction Light 252' West of Runway Centerline Projected (EL. 657.6')	
Obstruction Light 82' East of Runway Centerline Projected (EL. 650.0')	
Obstruction Light 250' East of Runway Centerline Projected (EL. 646.1')	

NORTH END OF EXISTING NORTH-SOUTH RUNWAY	
Structures	End (EL. 588.8')
Power Pole 318' West of Runway Centerline Projected (EL. 620.9')	
Power Pole 182' West of Runway Centerline Projected (EL. 615.5')	
Top of Tanktainer Company Building (EL. 618.4')	
Smoke Stack Tanktainer Company Building (EL. 623.1')	
Smoke Stack Tanktainer Company Building (EL. 622.7')	

[fol. 1412]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT No. P

MINUTES OF THE REGULAR MEETING OF THE BOARD OF AVIATION COMMISSIONERS OF THE CITY OF GARY HELD MONDAY, MARCH 22, 1954, IN THEIR OFFICES IN THE CITY HALL AT GARY, INDIANA, AT 1:30 P. M.

Present: Messers. Samuel P. Moise
Michael Lobo
C. W. Bader

Also present; Nick Jankovich

Mr. Moise called the meeting to order after which the minutes of March 10 were approved as read.

Mr. Moise read a letter from the C. A. A. in regard to the construction of an access road on the Gary Municipal Airport to be built for the military project by the Department of Defense, which letter is in the following words and figures, to-wit:

"March 17, 1954

Mr. Samuel F. Moise, President
Department of Aviation
City of Gary
Gary, Indiana

Dear Mr. Moise:

Reference is made to your letter dated March 12, 1954, concerning an approval by this Administration for the construction of an access road on the Gary Municipal Airport, Gary, Indiana, by the Department of Defense, its location being approximately 130 feet south of the existing N/S runway crossing the centerline extended at right angles.

During our meeting on March 11 with the Board of Aviation Commissioners, which was attended by Mr. Nurmi of the Corps of Engineers, we opposed the above location, based on three considerations:

1. Our airport design criteria, in the interest of safety, calls for a minimum clearance of 15 feet over highways, which is impossible to achieve at the proposed road location.

2. If the road is constructed in this location, it appears it will be necessary, in the interest of safety, to reduce the effective length of the runway for landings from the south to the north in order to get a 15-foot highway clearance.

3. Location of the road eliminates any possible runway extension to the south.

[fol. 1413] While it is recognized that the road is within the boundaries of the airport, its use will not be for normal airport maintenance equipment; rather, it will be used by many and various types of automobile equipment in serving its primary purpose.

Due to the prevailing winds, the N/S runway is the primary runway and any required reduction in its length will seriously affect aircraft movement into the airport. Realizing the necessity for this runway, Federal funds have been used to lengthen the runway and for lighting of obstructions in the south approach.

In view of the above, we cannot approve the location as shown by the Corps of Engineers. We consider the roadway should be located the required distance from the end of the runway necessary to achieve a minimum of 15′ clearance over the roadway, based on the existing controlling 27:1 glide path. The obstruction clearance line will begin at a point on the extended centerline of the runway 200′ beyond and at the same elevation as the end of the runway pavement.

During our meeting a lease from the City of Gary to the United States, executed by the mayor in February 1954, was examined. The Board of Aviation Com-

missioners had retroactively authorized the execution of the lease by the mayor as is apparently required by the Indiana Statute. The lease is apparently the standard Corps of Engineers lease, being for a ten-year term with a right of renewal for another ten years. The Exhibit "A" thereto is incorporated and delineates the three parcel areas leased as well as the location of the access road. Concerning the Exhibit "A," we call your attention to the fact that the actual area leased under the instrument for the access road is different from that shown on the Corps of Engineers plans; in fact, it appears that the area legally demised would close the end of the existing N/S runway as extended to the south under the FAAP project. It was agreed by the Corps of Engineers representative that a copy of the lease would be forwarded for our review.

During the meeting the Board brought to our attention that they may desire to lease certain parcels of airport property for the erection of a hotel. In order that we may determine whether such construction will interfere with the normal development of the airport in accordance with the Master Plan and that any lease entered into will not place the city in default on any obligation to the United States relative to the development, operation, or maintenance of the airport, it is requested that we be given the opportuntiy to review all such proposals before execution by the city. Concerning leases and operating agreements in general, we confirm the understandings previously had with our District Airport Office that we desire submissions of all such instruments for our review prior to their execution by the city.

We are very pleased with the operations and the housekeeping of your airport and desire you to know that our continued interest in your airport matters is only to assist and give to you our airport experience and advice concerning the many airport problems which aviation is confronted with today.

[fol. 1414] Mr. James Waedekin, Acting District Airport Engineer, located in our District Airport Office at 124 W. Ottawa Street, Lansing, Michigan, will be glad to confer with you on all such above matters; also, feel free to call upon me if I can be of any further assistance to you.

Very truly yours,

/s/ W. H. Erickson
William H. Erickson
Chief, Airports Division"

Upon motion duly made, seconded and unanimously carried, it was resolved by the Board of Aviation Commissioners that they hereby go on record, in view of the position taken by the C. A. A. as verified by correspondence from them, that, in so far as the N/S Runway is concerned at the Gary Municipal Airport, the Board refuse to permit the military project to be installed, unless the egress and ingress road is moved at least 400 feet South of the North edge of the N/S Runway and that a copy of the foregoing be sent to Colonel Kromer of the United States Corps of Engineers.

An exhibit submitted by Ozark Airlines, Inc. to the C. A. B. was shown to the Board which had been received by the Mayor, showing that they were trying to consolidate with North Central and Lake Central to give better service.

A letter was ordered written to the C. A. B. asking if they couldn't withhold delinquent rents due the City from the subsidies paid Lake Central and sending them statement of delinquent rents. A copy of this letter was ordered sent to Lake Central Airlines.

The matter of proposed hotel-motel was discussed and it was agreed by the Board that they would meet with Mr. H. E. Graham, Jr. on April 9 and ordered the Clerk to write Mr. Graham informing him of same.

The Clerk informed the Board that a wage determination had been filled out and sent in to C. A. A. in regard to the

obstruction lights to be installed by the Chicago, South Shore and South Bend Railroad.

There being no further business to be brought before the meeting, same was adjourned.

BOARD OF AVIATION COMMISSIONERS

/s/ SAMUEL P. MOISE

/s/ C. W. BADER

/s/ M. J. LOBO

ATTEST:

/s/ TED SIKORA
Secretary

[fol. 1415]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT "V"

[fol. 1416]

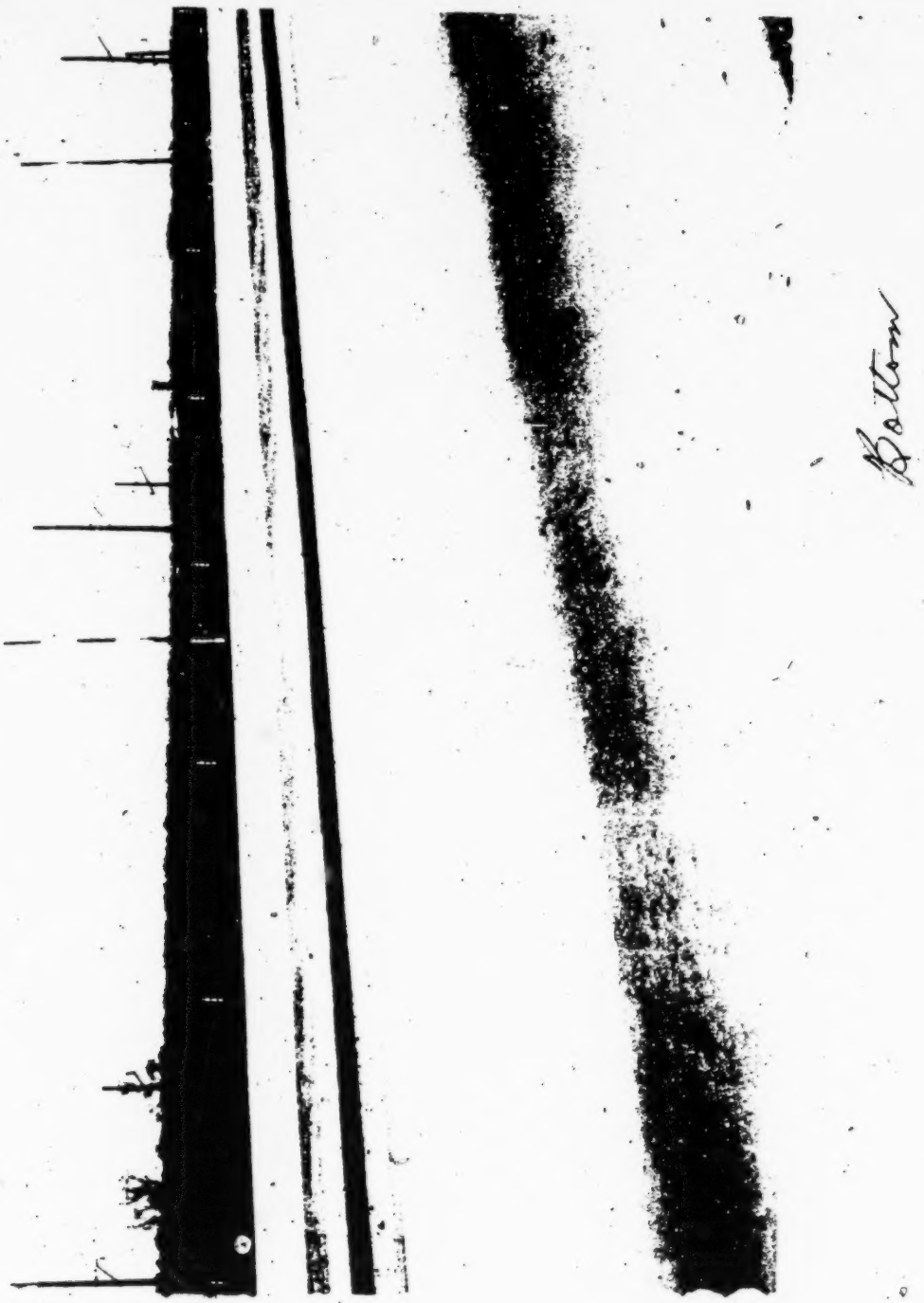
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT "W"

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. W



Bottom

[fol. 1417]

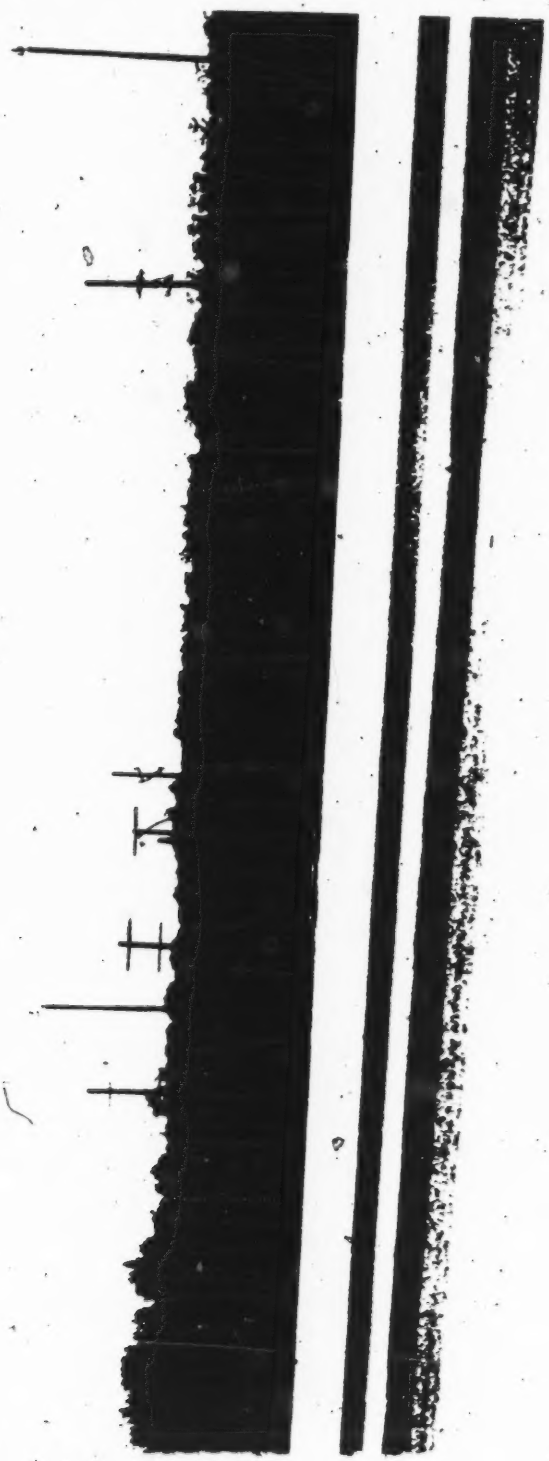
IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT X

(See Opposite) ☞

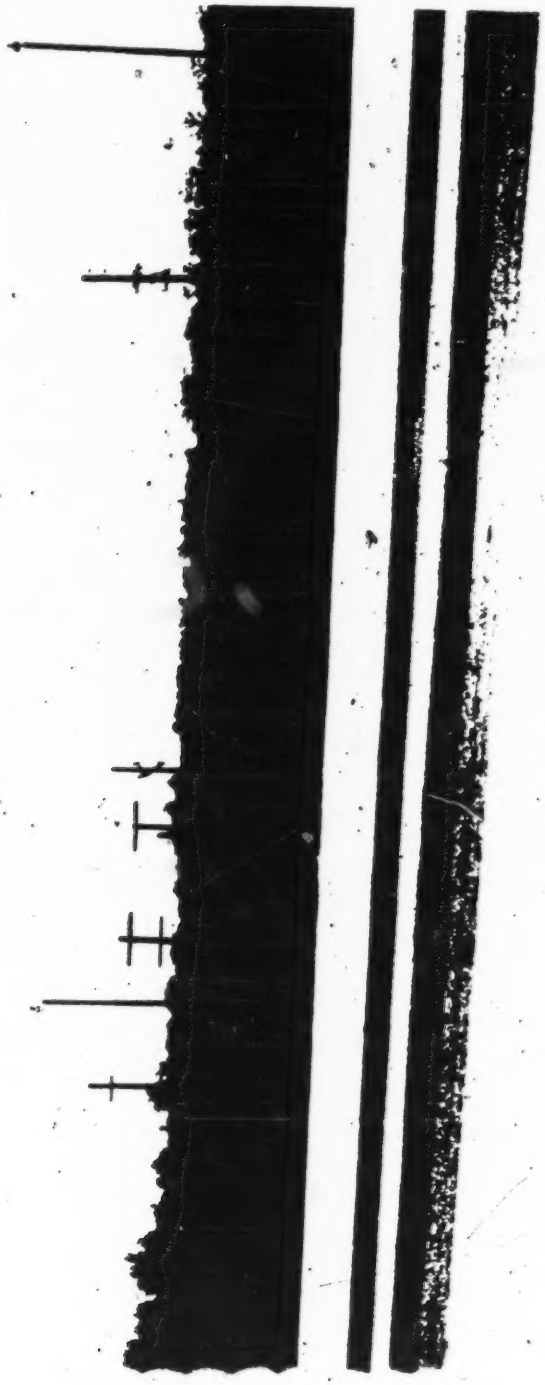
In the Porter Circuit Court of
Porter County, Indiana

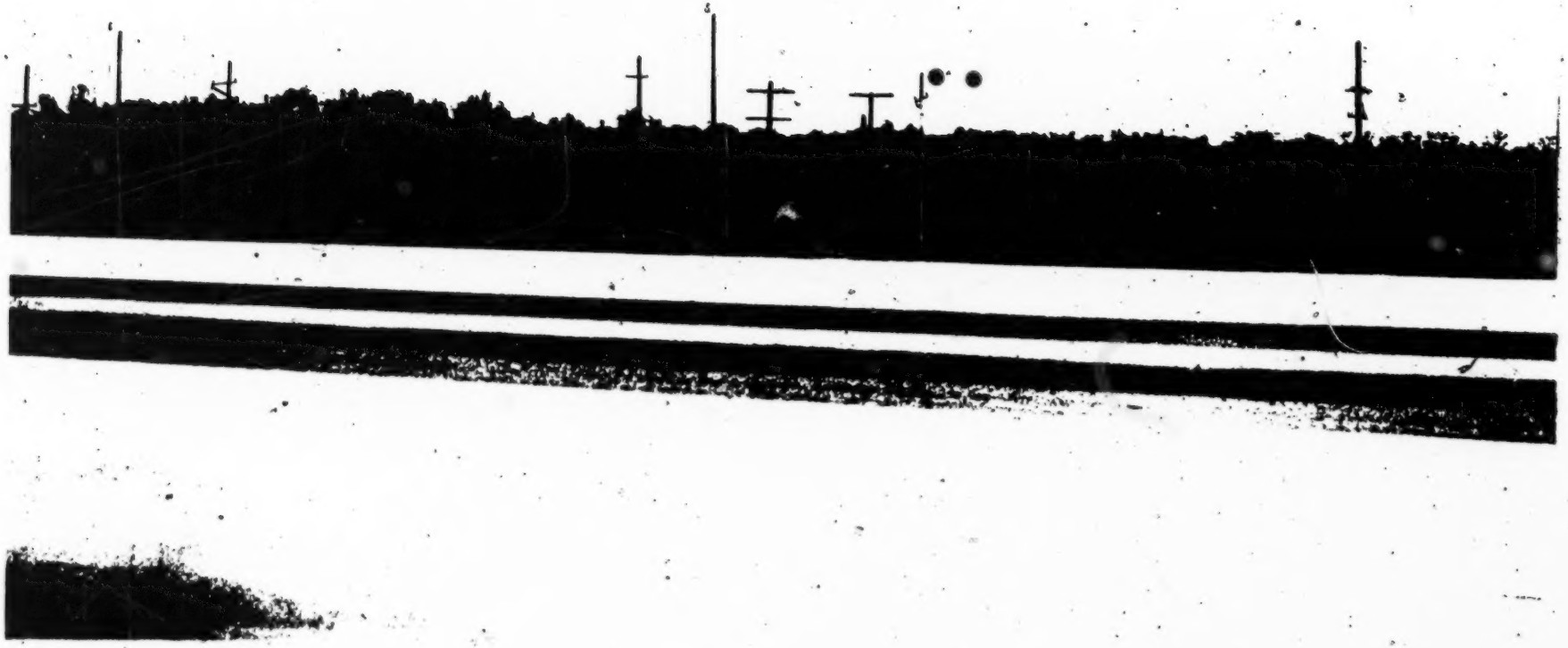
Defendant's Exhibit No. X



In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. X





[fol. 1418]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. HH

THIRD AMENDMENT TO GRANT AGREEMENT

Contract No. C3ea-7030
Gary Municipal Airport
Gary, Indiana
Project No. 9-12-007-103
Date: June 20, 1955

WHEREAS, The Administrator of Civil Aeronautics (hereinafter called the "Administrator"), has determined that, in the interest of the United States, the Grant Agreement relating to the above numbered project, between the Administrator, acting for and on behalf of the United States, and the City of Gary, Indiana (hereinafter called the "Sponsor"), accepted by the Sponsor on June 28, 1951, should be amended as hereinafter provided.

NOW, THEREFORE, WITNESSETH:

That in consideration of the benefits to accrue to the parties hereto, the Administrator, acting for and on behalf of the United States, on the one part, and the City of Gary, Indiana, on the other part, do hereby mutually agree that the said Grant Agreement be and hereby is amended by increasing the maximum obligation of the United States payable under said Grant Agreement, as amended, from $82,000 to $90,200.

IN WITNESS WHEREOF, the parties hereto have caused this Third Amendment to said Grant Agreement to be duly executed as of the 24th day of June, 1955.

UNITED STATES OF AMERICA
ADMINISTRATOR OF CIVIL AERONAUTICS

By /s/ WILLIAM B. DAVIS
Regional Administrator,
Region III

CITY OF GARY, INDIANA

By /s/ SAMUEL P. MOISE, PRES.
Title President, Board of Aviation
Commissioners

Title Secretary, Board of Aviation
(SEAL)

Attest

/s/ TED SIKORA
Title Secretary, Board of Aviation
Commissioners

1419]

IN THE PORTER CIRCUIT COURT OF
PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT NO. QQ

(See Opposite) ☞

In the Porter Circuit Court of
Porter County, Indiana

Defendant's Exhibit No. QQ

NO. 61 8-0071	**AIRPORT FACILITIES RECORD**	INSPECTED BY R. L. Stephenson	DATE 1-30-53
AIRPORT NAME	Gary Municipal Heliport	(16) TYPE Municipal	(17) CLASS 3
CITY AND STATE	Gary, Indiana (East Chicago, Indiana)	(17a) A. C. SERVICE CATEGORY 42 NW-SE (T)	
COUNTY	Lake MET AREA Chicago	(18) SERVED BY (Airline (s)) LCA (By 2-2?-53) Helicopter Air Service, Inc.	

19	PROPERTY OWNER City of Gary	57	CITY POPULATION 133,911
20	ADDRESS City Hall Gary, Indiana	58	LANDING AREA EXPANDABLE Yes DIRECTION AND EXTENT SE 1000'
21	OPERATOR Board of Aviation Commissioners	59	MAINTENANCE PERFORMED MOWING Yes SNOW Yes OTHER Gen. Maint.
22	ADDRESS City of Gary City Hall, Gary, Indiana	60	OFFICE OR ADMINISTRATION BUILDING (Specify) SIZE 20x30' Adm. Bldg. TYPE CONSTRUCTION Frame
	MANAGER Nich Jankovich	61	FIRE EQUIPMENT (Kind) Hand Extgr.
23	LATITUDE 41° 37' 00" LONGITUDE 87° 24' 45" ELEVATION 590' S	62 63 64	CONTROL TOWER (Operated by) RADIO (Ground to air) No ASSOC. RANGE STATION
24	DISTANCE AND DIRECTION FROM CITY 4.7 Stat. Mi. WNW	65	INSTRUMENT APPROCH SYSTEM
	LANDMARKS (Distance and Direction) U.S. Hwy. #12 North Boundary EJ & E RR West Boundary Grand Calumet River South Boundary	66 67	CAA COMMUNICATION STATION No WEATHER SERVICE (Type) AB ? Radio AT AIRPORT OR BY TELEPHONE Tel.
25	FIELD MARKINGS: BOUNDARY None OTHER Seg. circle near hangar area	68	TELEPHONE (Number) 53808 TELETYPE No TELEGRAPH By Telephone
26	TOTAL ACRES 617.37	69	DISTANCE TO RAIL TRANSFER POINT 1.8 M. NAME OF RAILROAD South Shore RR
27	DRAINAGE (Type) Subsurface	70	MEALS AT AIRPORT No
	TYPE OF SOIL Sand	71	LODGING AT AIRPORT No

28	RUNWAYS OR LANDING STRIPS								APRONS AND TAXIWAYS
29	DIRECTION	N-S		NW-SE					APRONS (Sq. yd.) 12,500
30	LENGTH	3100'		4600'					TAXIWAYS (Lin. ft.) 850'
31	WIDTH	100'		100'					LANDING AREA CONDITION
32	BASE	9"Slag		9"Slag					Good
33	SURFACE	1"Bit.		1"Bit.					Use paved runways only
34	GR. LDG. CAP	30,000# Single							

35	LANDING LIGHTS		IDEN. LIGHTS	WIND AND TRAFFIC INDICATORS	HANGARS					
36	RUNWAY (No. Runs.)	?	ROTATING BEACON	CONE Yes	NUMBER OF	DIMENSIONS	CONSTRUCTION	NUMBER OF	DIMENSIONS	CONSTRUCTION
37	BOUNDARY	No	SIZE	LIGHTED No	3-10T	80x209'	Metal			
38	THRESHOLD	Yes	COLOR	TEE Yes	1	140'x120'	Metal-Operator's Office			connected
39	FLOOD	No	CODE BEACON	LIGHTED Yes						
40	OBSTRUCTION	No	LOC.	TETRAH'N No						
41	APPROACH	No	CODE	LIGHTED						
42	OTHER	No	COURSE LIGHTS	SEG. CIRCLE Yes						
43	OPERATING SCHEDULE		LOC		NUMBER OF BASED AIRCRAFT		OTHER MAJOR BUILDINGS			
44	Request-Adv. notice (Elevated H.I.)		CODE		40		None			
45			OPERATING SCHEDULE		SPACE FOR TRANSIENTS					
46			No beacon		HANGAR	TIE-DOWN				
47					Yes	Yes				

48	FIXED BASE OPERATORS	ACTUAL AIRCRAFT SERVICES AVAILABLE
49		
50		

19	PROPERTY OWNER	City of Gary	
20	ADDRESS	City Hall Gary, Indiana	
21	OPERATOR	Board of Aviation Commissioners	
22	ADDRESS	City of Gary City Hall, Gary, Indiana	
	MANAGER	Nich Jankovich	
23	LATITUDE	41° 37' 00"	
	LONGITUDE	87° 24' 45"	
	ELEVATION	590' S	
24	DISTANCE AND DIRECTION FROM CITY	4.4 Stat.Mi.WNW	
	LANDMARKS (Distance and Direction)	U.S. Hwy. #12 North Boundary EJ & E RR West Boundary Grand Calumet River South Boundary	
25	FIELD MARKINGS: BOUNDARY	None	
	OTHER	Seg. circle near hangar area	
26	TOTAL ACRES	617.37	
27	DRAINAGE (Type)	Subsurface	
	TYPE OF SOIL	Sand	

57	CITY POPULATION	133,911
58	LANDING AREA EXPANDABLE	Yes
	DIRECTION AND EXTENT	SE 1000'
59	MAINTENANCE PERFORMED: MOWING	Yes
	SNOW	Yes
	OTHER	Gen.Maint.
60	OFFICE OR ADMINISTRATION BUILDING (Specify)	
	SIZE	28x30' Adm. Bldg.
	TYPE CONSTRUCTION	Frame
61	FIRE EQUIPMENT (Kind)	Hand Extgr
62	CONTROL TOWER (Operated by)	
63	RADIO (Ground to air)	No
64	ASSOC. RANGE STATION	
65	INSTRUMENT APPROCH SYSTEM	
66	CAA COMMUNICATION STATION	No
67	WEATHER SERVICE (Type)	AB ? Radio
	AT AIRPORT OR BY TELEPHONE	Tel.
68	TELEPHONE (Number)	5308
	TELETYPE	No
	TELEGRAPH	By Telephone
69	DISTANCE TO RAIL TRANSFER POINT	1.8 M.
	NAME OF RAILROAD	South Shore RR
70	MEALS AT AIRPORT	No
71	LODGING AT AIRPORT	No

RUNWAYS OR LANDING STRIPS

DIRECTION	N-S		NW-SE					
LENGTH	3100'		4600'					
WIDTH	100'		100'					
BASE	9"Slag		9"Slag					
SURFACE	1"Bit.		1"Bit.					
GR. LDG. CAP	30,000# Single							

APRONS AND TAXIWAYS

APRONS (Sq. yd.)	12,500
TAXIWAYS (Lin. ft.)	850'
LANDING AREA CONDITION	Good
	Use paved runways only

LANDING LIGHTS		**IDEN. LIGHTS**	**WIND AND TRAFFIC INDICATORS**
RUNWAY (No. Rwys.)	?	ROTATING BEACON	CONE Yes
BOUNDARY	No	SIZE	LIGHTED No
THRESHOLD	Yes	COLOR	TEE Yes
FLOOD	No	CODE BEACON	LIGHTED Yes
OBSTRUCTION	No	LOC.	TETRAH'N No
APPROACH	No	CODE	LIGHTED
OTHER	No	COURSE LIGHTS	SEG. CIRCLE Yes
OPERATING SCHEDULE	Request-Adv.notice (Elevated R.I.)	LOC.	
		CODE	
		OPERATING SCHEDULE	No beacon

HANGARS

NUMBER OF	DIMENSIONS	CONSTRUCTION	NUMBER OF	DIMENSIONS	CONSTRUCTION
3-10T	80x209'	Metal			
1	140'x120'	Metal	Operator's Office		connected

NUMBER OF BASED AIRCRAFT	40
SPACE FOR TRANSIENTS	
HANGAR	Yes
TIE-DOWN	Yes
OTHER MAJOR BUILDINGS	None

FIXED BASE OPERATORS

AIRPORT ATTENDED (State when): Days only

ACTUAL AIRCRAFT SERVICES AVAILABLE

NAME OF OPERATOR	FUEL: TYPE STORAGE	FUEL: CAPACITY	FUEL: OCTANE	HANGAR STORAGE	REPAIRS: MAJOR A-E	REPAIRS: MINOR A-E	CHARTER SERVICE	FLIGHT INSTR.	OTHER (Specify)
Calumet Air Service	Tank	12,000	80	Yes	A-E	A-E	Yes	Yes	Sales
	"	12,000	91						Parts
	"	12,000	100						

APPROACHES

	N	NE	E	SE	S	SW	W	NW
STANDARD ZONE: Yes								
EXISTING GLIDE ANGLE	23:1			50:1	23:1			40:1
CONTROLLING OBSTR.	P.Lines			Clear	P.Line			P.Line
DIST. FROM RNWY. END	980'				1580'			1230'

FORM ACA-28 A (2-60) (FACE)

[fol. 1420]

IN THE PORTER CIRCUIT COURT OF PORTER COUNTY, INDIANA

DEFENDANT'S EXHIBIT RR

(See Opposite) ☞

In the Porter Circuit Court of Porter County, Indiana

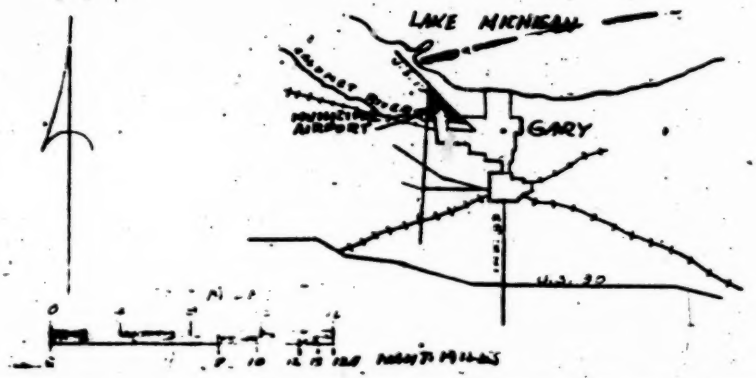
Defendant's Exhibit No. RR

JUNE 21 1957

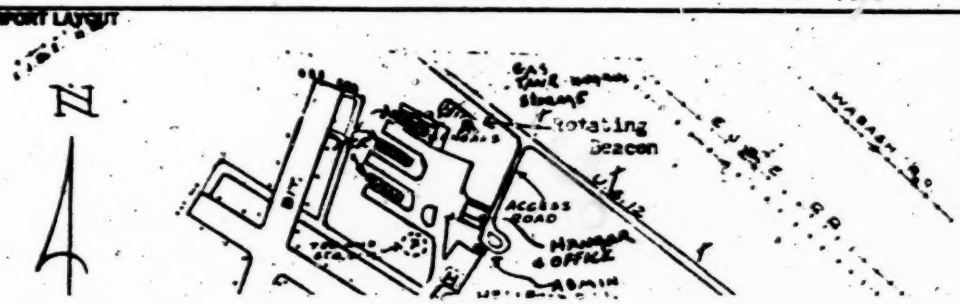
CITY AND STATE: Gary, Indiana	AIRPORT: Gary Municipal		SEC 5803
COUNTY: Lake Ind.	SERVICE TYPE: Trunk		CHART: Chicago
LAT. 41° 37' LONG. 87° 25'	ELEV. 590' S	DIST. AND DIR. FROM CITY: 4 Mi. W	NEAR AIRPORT ATTENDED: See Remarks
OWNER: City of Gary ADDRESS: Gary Hall Gary, Indiana	OPERATOR: Board of Aviation Comm. ADDRESS: City of Gary City Hall, Gary, Indiana		MANAGER: Mr. Nick Jankovich ADDRESS: Gary Municipal Airport Gary, Indiana
FUEL OCTANE: 80-91-100 CAPACITY (GALS.): 36,000	FLIGHT ACTIVITIES: NUMBER OPERATIONS: 1 REPAIRS: Major-Minor A&E ☒ INSTRUCTIONAL ☐ AGRICULTURAL ☐ CHARTER ☐ PATROL, SURVEY, ADVERTISING ☒ OTHER (SPECIFY): Sales		RECOMMENDED CIRCLE: ☒ YES ☐ NO S.A.C. OPERATIONS APPVD: ☒ DAY ☒ NIGHT AIRCRAFT APPVD: DC-3, DC-4, Convair, Martin. AIRLINES: LCA
☐ TOWER ☐ A/G ☐ RADIO ☐ RADAR ☐ BEACON ☐ WEATHER ☐ OTHER (SPECIFY): Private "H" owned & operated by LCA			
FIRE CRASH EQUIP.: Ansul Jeep. Hand Fire Extinguishers.	USED FUNCTIONS: LIGHTED ☒ YES ☐ NO ☒ TEE ☐ SEWE ☐ TETRAHEDRON		
BASED AIRCRAFT: TOTAL 58	LIGHTS: ☐ THRESHOLD ☐ APPROACH ☒ OBSTR TYPE OF REPL.: MI 20-2; 12-30, PR. ☒ REVOLVING BEACON COLOR: CAG		RESTRICTIONS: Airport attended days only for transient airplanes. LCA personnel attend airport for their flights.
BASED TRANS. & PLACE: 10	OPERATION SCHEDULE: Dusk to Dawn		INSPECTED BY: W. W. Scott 5-21-57
BASED MULTI-ENGINE AIRCRAFT: 8	ATTENDED: ☒ YES ☐ NO		

RUNWAY DIRECT. →	20	2	12	30							
APPROACH SLOPE: EFFECTIVE GLIDE ANGLE	20:1	21:1	49:1	50:1							
APPROACH SLOPE: CONTROLLING OBSTRUCTN	Trees	Poles	Poles								
APPROACH SLOPE: DIST. FROM RWY. END	800'	1200'	1620'								

AIRPORT LOCATION

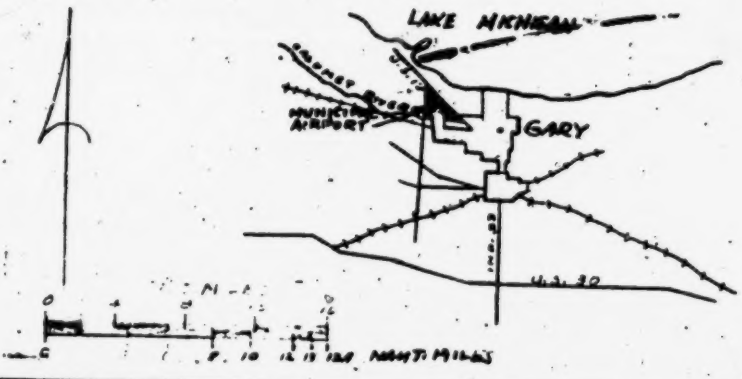


AIRPORT LAYOUT

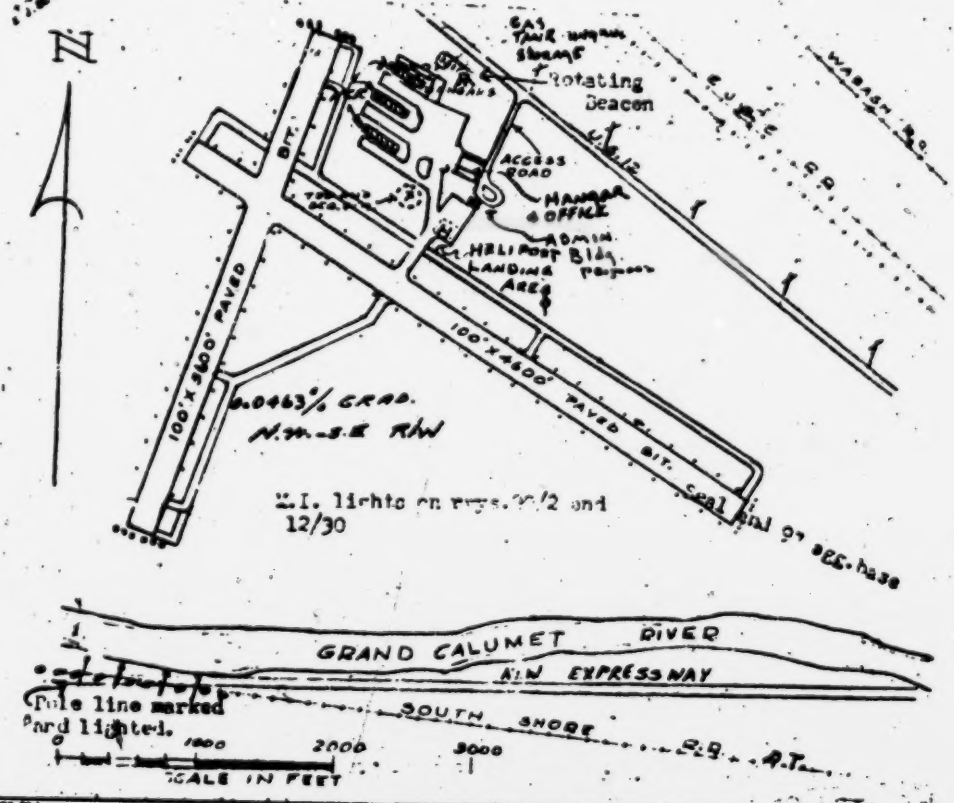


CONTROL & OBSTRUCTN'S	Trees	Poles	Poles
DIST. FROM RWY. END	600'	1200'	1620'

AIRPORT LOCATION



AIRPORT LAYOUT



FORM ACA-50A (6-55)

U.S. DEPARTMENT OF COMMERCE — CIVIL AERONAUTICS ADMINISTRATION

RECORD OF AIRPORT FACILITIES

[fol. 1421] [File endorsement omitted]

Attorneys for Appellant: Robert L. McMahan, South Bend, Indiana; Winfield L. Houran, Valparaiso, Indiana; Paul J. DeVault, Indianapolis, Indiana.

Chester, Clifford, Hoeppner and Houran, and Krieg, DeVault, Alexander & Capehart, Of Counsel.

Attorney for Appellees: Straley Thorpe, Hammond, Indiana.

IN THE SUPREME COURT OF INDIANA

No. 30109

INDIANA TOLL ROAD COMMISSION,
A Body both Corporate and Politic, Appellant,

v.

NICK JANKOVICH and PAUL JANKOVICH, Co-partners, d/b/a Calumet Aviation Company, Appellees.

APPEAL FROM THE PORTER CIRCUIT COURT
Alban M. Smith, Special Judge

OPINION—Filed October 24, 1963

ACHOR, Judge

This is an action for damages alleged to have been sustained by appellees as a result of the construction by appellant of the Indiana East-West Toll Road in violation of a Master Airport Zoning Ordinance of the City of Gary, and the contract rights of appellees as lessees of a portion of the Gary Municipal Airport. The appellees also sought to enjoin and restrain appellant from maintaining the toll road at its present elevation.

The circumstances giving rise to this litigation are as follows: The City of Gary enacted an ordinance in September, 1949, creating an airport commission. The ordinance further purported to incorporate, as a part thereof,

the Gary Airport Zoning Map which defined and described details of construction and the boundaries of said airport. [fol. 1422] The airport so described encompassed an area of approximately one square mile. It was located in an area bounded generally by industrial plants on the north, and on the south by the Grand Calumet River, beyond which were the Lake Shore Railroad, the utility lines of the Northern Indiana Public Service Company, and a residential area.

The ordinance was enacted pursuant to the authority as authorized by Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 169, § 6, p. 252 [being § 14-422, Burns' 1950 Repl.]. The provision therein which is directly related to this litigation, presumed to invest the City of Gary with jurisdiction over structures for six miles in all directions radiating from said airport, and to provide that no structure should be erected within the inner area approach zone to any proposed runway for a distance extending 6,000 feet from the end of the proposed runway to any height which would interfere with the glide angle therefrom of 40 feet horizontally to each one foot of vertical height. The ordinance further provided for the granting of non-conforming uses and variances, upon showing of good and sufficient reasons, before the Board of Zoning Appeals in the City of Gary under its rules and regulations.

Pursuant to said ordinance and in conformity with the details of construction described in said Gary Airport Zoning Map, three runways were constructed, except that approximately 300 feet was omitted from the south end of the north and south runway, which runway is involved in this action.

On or about March 23, 1950, appellees entered into a 20 year lease for the operation of said airport. Pursuant to said lease, appellees expended approximately $400,000 in the building of hangars, the purchase of equipment and facilities for the operation of the general business of said airport.

[fol. 1423] Thereafter the appellant located and constructed its toll road, parallel with the south side of the Gary Municipal Airport in such manner as to cross the inner area approach zone of the north-south runway as

prescribed by the ordinance, the road being approximately 743 feet south of the south end of said proposed runway, and approximately 25 feet higher than the elevation of the end of said proposed runway.

Under the ordinance the permitted elevation of structures at the location of the toll road was approximately 18½ feet, the toll road thus projecting itself into the prohibited area about 6½ feet. It is this encroachment by appellants upon the approach zones to the airport, as fixed by the ordinance, that appellees based their action for damages.

Three basic issues are raised by appellants to appellees' right to recover damages by reason of appellant's noncompliance with the ordinance: (1) Does the ordinance rest upon any valid legislative authority; (2) does the ordinance purport to effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States; and (3) if the ordinance does not effect an unconstitutional taking of private property for public use, but merely operates as a limitation upon the use of private property by a municipality, within the valid exercise of the police power, may that limitation of use be divested without compensation by an agency of the state which is subsequently granted authority to occupy land and air space upon which there had previously been placed a limitation as to its use?

Because of the decision which we have reached in this case, it is necessary that we consider only appellant's [fol. 1424] second contention, namely, that the provisions of the ordinance relied upon by appellees was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant constructed its toll road.

This reason for the invalidity of the ordinance was urged by appellant in its objection to the admissibility of the ordinance and the maps or plans offered by appellees as a part thereof. The same issue was asserted as grounds for a motion for a finding for the defendant filed at the conclusion of the plaintiffs' evidence and after plaintiffs had rested their case, which motion was overruled.

The fact that private property may not be taken for public use without compensation is not debatable.[1] However, in determining whether this constitutional protection has been violated by the ordinance under consideration, two main issues arise: (1) Whether air space above land is a constitutionally protected property right, and (2) whether in the instant case there has been a constitutionally proscribed taking.

With respect to the first issue, the law has been made clear by both legislative and judicial declaration that a landowner is also the owner of the air space above his property, at least to the extent that such air space may reasonably be used by him. The Indiana Legislature has [fol. 1425] provided that:

> "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, . . . " Acts 1927, ch. 43, § 3, p. 119 [being § 14-103, Burns' 1956 Repl.].

Also, the property right of a landowner in the air space above his property was recognized in numerous decisions of this court and the federal courts. In *Capitol Airways, Inc.* v. *Indianapolis P. & L. Co.* (1938), 215 Ind. 462, 466, 18 N.E. 2d 776, 778, suit had been brought by an airport operator, who admittedly had no right to take property by eminent domain against a public utility, for damages

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[1] "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Article 1, § 21 Indiana Constitution.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amend. Constitution of the United States. Pennsylvania Coal Co. v. Mahon (1922), 260 U. S. 393, 67 L. Ed. 322, 43 S. Ct. 158; General Outdoor Advertising Co. v. City of Indianapolis (1930), 202 Ind. 85, 172 N. E. 309.

and an injunction. The wrongful act complained of was the erection of a power line by the public utility which, it was claimed, obstructed the flight of airplanes into and out of the airport. This court affirmed the sustaining of a demurrer to the complaint and stated:

> "The establishment of an airport upon the appellant's land in no way affected or limited the right of adjacent landowners to use their land in any manner and for any purpose for which they might have used it before. Had the appellee chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport. . . . "

The Supreme Court of the United States also has given recognition to property rights in air space accruing to the owner of the land beneath. In *U. S.* v. *Causby* (1946), 328 U. S. 256, 264, 90 L. Ed. 1206, 66 S. Ct. 1062, the problem [fol. 1426] presented was whether property was taken, within the meaning of the Fifth Amendment to the Constitution of the United States, by frequent and regular flights of military aircraft over the claimant's land at low altitudes. The court held there had been a taking of an easement over the property for which compensation had to be paid, and stated:

> "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."

For an excellent analysis of the problem, see *Ackerman* v. *Port of Seattle;* amended opinion at 55 Wash. 2d 400, 348 P. 2d 664 (1960), unamended opinion at 329 P. 2d 210 (1958).

The *Causby* case, *supra,* was reaffirmed by the Supreme Court of the United States on March 5, 1962, in *Griggs* v. *Allegheny County,* 369 U. S. 84, 90, 7 L. ed. 2d 585, 589,

82 S. Ct. 531, reh. den. 369 U. S. 857, 8 L. ed. 2d 16, 82 S. Ct. 931, involving frequent low landings and take-offs over the residence of the petitioner. The Supreme Court held that there had been a taking of property in violation of the Fourteenth Amendment. The reasoning of the court was expressed as follows:

> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. For respondent agreed with the C.A.A. that it would operate the airport 'for the use and benefit of the public,' that it would operate it 'on fair and reasonable terms and without unjust discrimination,' and that it would not allow any carrier to acquire 'any exclusive right' to its use.
>
> "The glide path for the northeast runway is as necessary for the operation of the airport as is a surface [fol. 1427] right of way is [sic] for operation of a bridge, or as is the land necessary for the operation of a dam. See United States v. Virginia Electric & Power Co., 365 US 624, 630, 5 L ed 2d 838, 845, 81 S Ct 784. As stated by the Supreme Court of Washington in Ackerman v. Seattle, 55 Wash 2d 401, 413, 348 P2d 664, 671, 77 ALR2d 1344, ' . . . an adequate approach way is as necessary a part of an airport as is the ground on which the airport itself is constructed. . . . ' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."

In the light of the above authorities we conclude that the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation.

The next problem is whether an unconstitutional taking has resulted in the instant case. In considering this point the distinction must be made between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of the police power, and a taking of property for a public use, for which compensation must be paid. In the former instance, where the owner of property is merely restricted in the use and enjoyment of his property, he is not entitled to compensation. A common example of such an authorized restriction is the imposition on property of building set-back lines. *Gorieb* v. *Fox* (1927), 274 U.S. 603, 71 L. Ed. 1228, 47 S. Ct. 675; *Bd. of Zoning Ap. of Decatur* v. *Jehovah's Witnesses* (1954), 233 Ind. 83, 117 N.E. 2d 115; *Goldsmith* v. *City of Indianapolis* (1935), 208 Ind. 465, 196 N. E. 525.

However, mere regulation under the police power which can be modified at the discretion of regulating authority is wholly different from the taking or appropriating of private property by the government for a specific public use. The latter can be effected only if compensation is provided. *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393, 67 L. Ed. 322, 43 S. Ct. 158; 1 Metzenbaum, Law of Zoning 70-76 (2d ed. 1955); *Griggs* v. *Allegheny, supra.*

[fol. 1428] With this distinction established, it becomes apparent that the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary Airport without the payment of compensation.

True, the ordinance provided that an aggrieved landowner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful. In any event, a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety. *Village of Euclid* v. *Ambler* (1926), 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114; 1 Metzenbaum, op. cit. *supra* at 708. An unconstitutional law cannot be made constitutional by merely providing a procedure which gives a complaining

party the right of judicial review. *Finney* v. *Johnson* (1962), 242 Ind. 465, 179 N.E. 2d 718.

Our attention has been called to the fact that the preamble of the ordinance shows that its purpose is to exercise the right of eminent domain under the guise of the police power.[2] However, as has been stated:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, . . . is a palpable [fol. 1429] invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constition."

Mugler v. *Kansas* (1887), 123 U. S. 623, 661, 31 L. Ed. 205, 8 S. Ct. 273; see also 1 Metzenbaum, *op. cit. supra* at 77-79.

The issue before us was considered by the Supreme Court of New Jersey in the case of *Yara Engineering Corp.* v. *Newark* (1945), 132 N.J.L. 370, 373, 40 A. 2d 559, 561. The City of Newark had adopted an airport zoning ordinance creating airport approaches and turning zones in the vicinity of the Newark Municipal Airport and regulating and restricting the height of structures in these zones. A proceeding was brought to set aside the ordinance. In holding the ordinance unconstitutional, the Supreme Court of New Jersey stated:

> "We conclude that this ordinance . . . is in fact the taking of private property without due process of law, in violation of the Fourteenth Amendment of the

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[2] "WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power. . . ." Gary Ordinance No. 2897 [dated Sept. 19, 1949].

United States Constitution, and also the taking for public use without just compensation, in violation of article 1, paragraph 16 of the State Constitution.

"The City may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain. . . . "

See also cases cited at Anno. 77 A.L.R. 2d 1362.

The federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation. This is shown by the condemnation proceedings in *United States* v. *48.10 Acres of Land* (S.D.N.Y. 1956), 144 F. Supp. 258, and *United States* v. *4.43 Acres of Land* (N.D. Tex. 1956), 137 F. Supp. 567, for air easements over property adjoining federal bases.

On the basis of the above authorities, we conclude that the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation.

[fol. 1430] Appellee finally asserts that even though the ordinance unlawfully may have effected a taking of the land subsequently acquired by the toll road without compensation, it was the duty of "any immediate property owner" to protect himself by inverse condemnation proceedings under authority provided in the Eminent Domain Statute, citing §§ 3-1706-3-1711, Burns' 1946 Repl., and that they having failed to do so, their rights must be considered waived.

Appellees' position is not tenable for two reasons: The statute providing for inverse condemnation proceedings presumes (1) that the taking was an accomplished fact, and (2) that it took place under some constitutional authority, with respect to which, however, the prescribed procedure had not been followed. In this case there had not been any actual encroachment upon or taking of the air space over the land in question within the area specified by the ordinance. This was impossible, because the power lines which

are adjacent to, parallel with, are much higher than the toll road complained of. Furthermore, as heretofore discussed, the ordinance, upon which appellees' alleged property right is based, was wholly void insofar as it purported to authorize the taking of private property without compensation therefor. Under these circumstances, as conceded by appellees in their brief, "If it [the ordinance] is wholly void then of course no rights are created thereby and it can be the basis for nothing and may be collaterally attacked."

Judgment is reversed and the trial court is directed to sustain appellant's motion for a finding for defendant [appellant], which motion was filed at the conclusion of appellees' evidence.

Myers, C.J., Arterburn & Landis, JJ. concur.
Jackson, J. dissents [without opinion].

[fol. 1431]

IN THE SUPREME COURT OF INDIANA

ORDER DENYING REHEARING—December 17, 1963

Rehearing Denied.

December 17, 1963.

Jackson, J., dissents.

Frederick Landis, Chief Justice.

[fol. 1432]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1963

NICK JANKOVICH and PAUL JANKOVICH, Co-Partners, d/b/a CALUMET AVIATION COMPANY, Petitioners,

vs.

INDIANA TOLL ROAD COMMISSION.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 28, 1964

Upon Consideration of the application of counsel for petition(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1964.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of February, 1964.

[fol. 1433]

SUPREME COURT OF THE UNITED STATES

No. 1000—October Term, 1963

NICK JANKOVICH and PAUL JANKOVICH, Co-partners, doing business as CALUMET AVIATION COMPANY, Petitioners,

vs.

INDIANA TOLL ROAD COMMISSION.

ORDER ALLOWING CERTIORARI—May 25, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Indiana is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.